

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE) C-11-02509 LHK
ANTITRUST LITIGATION,)
) SAN JOSE, CALIFORNIA
)
) OCTOBER 26, 2011
)
-----) PAGES 1-95
THIS DOCUMENT RELATES TO:)
ALL ACTIONS)
-----)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFFS: LIEFF, CABRASER,
HEIMANN & BERNSTEIN
BY: JOSEPH R. SAVERI,
BRENDAN P. GLACKIN,
KATHERINE M. LEHE, AND
DEAN M. HARVEY
275 BATTERY STREET, 30TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

APPEARANCES CONTINUED ON NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

APPEARANCES (CONTINUED)

FOR DEFENDANT O'MELVENY & MYERS
APPLE: BY: GEORGE A. RILEY,
MICHAEL F. TUBACH, AND
CHRISTINA BROWN
TWO EMBARCADERO CENTER
28TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

FOR DEFENDANT KEKER & VAN NEST
LUCASFILM: BY: JOHN W. KEKER AND
DANIEL PURCELL
633 BATTERY STREET
SAN FRANCISCO, CALIFORNIA 94111

FOR DEFENDANT MAYER BROWN
GOOGLE: BY: LEE H. RUBIN
TWO PALO ALTO SQUARE, SUITE 300
PALO ALTO, CALIFORNIA 94306

FOR DEFENDANTS JONES DAY
ADOBE AND INTUIT: BY: CRAIG E. STEWART
555 CALIFORNIA STREET
26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

BY: CATHERINE T. BRODERICK
1755 EMBARCADERO ROAD
PALO ALTO, CALIFORNIA 94303

FOR DEFENDANT BINGHAM MCCUTCHEN
INTEL: BY: FRANK M. HINMAN
1117 S. CALIFORNIA AVENUE
PALO ALTO, CALIFORNIA 94304

BY: ZACHARY J. ALINDER
THREE EMBARCADERO CENTER
SAN FRANCISCO, CALIFORNIA 94111

FOR DEFENDANT COVINGTON & BURLING
PIXAR: BY: EMILY J. HENN
333 TWIN DOLPHIN DRIVE, SUITE 700
REDWOOD SHORES, CALIFORNIA 94065

SAN JOSE, CALIFORNIA

OCTOBER 26, 2011

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE
FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: CALLING CASE NUMBER
C-11-02509 LHK, IN RE: HIGH-TECH EMPLOYEE ANTITRUST
LITIGATION.

STATE YOUR APPEARANCES, PLEASE.

MR. SAVERI: GOOD AFTERNOON, YOUR HONOR.
JOSEPH SAVERI, LIEFF, CABRASER, HEIMANN & BERNSTEIN
ON BEHALF OF PLAINTIFFS.

THE COURT: GOOD AFTERNOON.

MR. GLACKIN: BRENDAN GLACKIN OF LIEFF,
CABRASER.

MS. LEHE: KATHERINE LEHE FROM LIEFF,
CABRASER ON BEHALF OF PLAINTIFFS.

MR. HARVEY: DEAN HARVEY OF LIEFF,
CABRASER ON BEHALF OF PLAINTIFFS.

THE COURT: OKAY. GOOD AFTERNOON.

MR. O'RILEY: GOOD AFTERNOON, YOUR HONOR.
GEORGE RILEY OF O'MELVENY & MYERS. I'M JOINED BY
MY COLLEAGUE, MICHAEL TUBACH, AND WE REPRESENT
APPLE.

1 THE COURT: OKAY. GOOD AFTERNOON.

2 MR. KEKER: GOOD AFTERNOON, YOUR HONOR.

3 JOHN KEKER AND DAN PURCELL OF KEKER & VAN NEST. WE
4 REPRESENT LUCASFILM.

5 THE COURT: OKAY. GOOD AFTERNOON.

6 MR. RUBIN: GOOD AFTERNOON, YOUR HONOR.

7 LEE RUBIN FROM MAYER BROWN ON BEHALF OF GOOGLE.

8 THE COURT: OKAY. GOOD AFTERNOON.

9 MR. STEWART: GOOD AFTERNOON, YOUR HONOR.

10 CRAIG STEWART OF JONES DAY HERE ON BEHALF OF ADOBE
11 AND INTUIT.

12 THE COURT: YOU SAID CRAIG STEWART?

13 MR. STEWART: CORRECT.

14 THE COURT: OKAY.

15 MR. HINMAN: GOOD AFTERNOON, YOUR HONOR.

16 FRANK HINMAN AND ZACH ALINDER WITH BINGHAM
17 MCCUTCHEN REPRESENTING INTEL.

18 THE COURT: OKAY. GOOD AFTERNOON.

19 ACTUALLY, LET ME ASK MR. STEWART, WHO IS
20 WITH YOU FROM JONES DAY ON BEHALF OF ADOBE?

21 MR. STEWART: WELL, CATE BRODERICK IS
22 HERE WITH ME TODAY, AND WE ARE JOINTLY REPRESENTING
23 BOTH ADOBE AND INTUIT.

24 THE COURT: OH, I SEE. OKAY. GOT IT.

25 MS. HENN: GOOD AFTERNOON, YOUR HONOR.

1 EMILY HENN BEHIND OF COVINGTON & BURLING
2 REPRESENTING DEFENDANT PIXAR.

3 THE COURT: OKAY. GOOD AFTERNOON.

4 I THINK THAT'S IT. THAT IS THE CAST OF
5 THOUSANDS; CORRECT? OKAY.

6 ALL RIGHT. SO I'M GOING TO GO AHEAD AND
7 DECIDE TODAY BOTH THE MOTION TO STAY AND THE
8 DISCOVERY DISPUTE.

9 I'D LIKE TO VACATE THE DECEMBER 8TH
10 HEARING DATE ON THE MOTION FOR TEMPORARY STAY. I
11 THINK IT'S ALL THE SAME ISSUE, DISCOVERY DISPUTE
12 NUMBER 1, AS WELL AS THE MOTION FOR STAY.

13 DO YOU WANT TO BE HEARD ON THAT?

14 AND I CAN TELL YOU WHAT MY TENTATIVE
15 THOUGHTS ARE IF THAT WOULD HELP.

16 MR. RUBIN: SURE, THAT WOULD, YOUR HONOR.

17 THE COURT: OKAY. I GUESS I DON'T AGREE
18 WITH THE DEFENDANTS THAT TWOMBLY SAYS THAT A STAY
19 OF DISCOVERY IS REQUIRED IN AN ANTITRUST CASE AS IT
20 WOULD BE IF IT WERE UNDER THE PSLRA.

21 AND EVEN THOUGH IT WAS A MOTION TO
22 DISMISS AND DIDN'T REALLY SET A STANDARD FOR STAYS
23 AND ANTITRUST CASES, IT SEEMS LIKE THE TWO THINGS
24 YOU'RE SUPPOSED TO LOOK AT ARE WHETHER A CLAIM, A
25 SURVIVABLE CLAIM TO A MOTION TO DISMISS IS LIKELY

1 TO BE ALLEGED, AND WHAT THE BURDEN AND INTRUSION
2 WOULD BE ON THE DEFENDANTS.

3 AND UNLIKE IN TWOMBLY, IN THIS CASE YOU
4 ALREADY HAVE A D.O.J. INVESTIGATION, YOU ALREADY
5 HAVE A D.O.J. INVESTIGATION FINDING OF PER SE
6 UNLAWFUL AGREEMENTS UNDER SECTION 1 OF THE SHERMAN
7 ACT, AND SO IN MY MIND, THAT SORT OF MINIMIZES THE
8 BURDEN SINCE YOU'VE ALREADY GONE THROUGH THE
9 DOCUMENT REVIEW PROCESS, THE PRIVILEGE LOG
10 CREATION, THE BATES STAMPING, THE PRODUCTION. I
11 ASSUME YOU HAVE SOMETHING THAT WOULD BE READY TO
12 GO, JUST PHOTOCOPIED AND READY TO GO.

13 I MEAN, YOU CAN CORRECT ME IF I'M WRONG.

14 AND WHILE I AGREE WITH YOU JUST FROM WHAT
15 LITTLE I'VE SEEN SO FAR -- AND I UNDERSTAND THERE
16 HASN'T BEEN FULL BRIEFING -- THE OVERALL SORT OF
17 MOTHER LOAD CONSPIRACY SEEMS PRETTY THIN.

18 BUT ON THE OTHER HAND, THERE'S A LOT OF
19 AIR THERE IN THIS CASE, MAYBE BECAUSE THEY DO HAVE
20 THE BENEFIT OF THE D.O.J. COMPLAINT.

21 AND I'VE TAKEN A LOOK AT THE FINAL
22 JUDGMENTS IN THE DISTRICT OF COLUMBIA, THE D.C.
23 CASE.

24 SO I -- MY CURRENT THINKING IS TO DENY A
25 TEMPORARY STAY, BUT TO LIMIT WHAT DISCOVERY I ALLOW

1 BEFORE -- THE HEARING IS SET FOR, WHAT,
2 JANUARY 26TH FOR THE MOTION TO DISMISS? WHEN IS
3 THAT?

4 MR. RUBIN: JANUARY 19TH?

5 THE COURT: OKAY. IT'S SET ON
6 JANUARY 19TH?

7 MR. RUBIN: NO, NO. I THINK THAT WAS AN
8 EARLIER DATE, YOUR HONOR.

9 MR. KEKER: 26TH, YOUR HONOR.

10 THE COURT: 26TH, YEAH.

11 MR. KEKER: YOUR HONOR, CAN WE SIT DOWN?

12 THE COURT: OH, PLEASE. I CERTAINLY
13 DIDN'T MEAN TO REQUIRE ANYONE TO STAND UP. AND
14 YOU'RE WELCOME TO SIT AT COUNSEL TABLE IF THAT'S
15 MORE COMFORTABLE FOR YOU AS WELL.

16 MR. RUBIN: I WOULD LIKE TO ADDRESS A FEW
17 OF THE POINTS.

18 THE COURT: ALL RIGHT. SO LET ME TELL
19 YOU WHAT I WOULD ORDER.

20 MR. RUBIN: OKAY.

21 THE COURT: I AM -- I'VE ALSO TAKEN A
22 LOOK AT THE REQUESTS THAT THE PLAINTIFFS HAVE MADE,
23 WHICH I THINK ARE OVERBROAD, BUT I THINK THE ONES
24 THAT RELATE TO WHATEVER THE DEFENDANTS HAVE
25 PRODUCED TO THE DEPARTMENT OF JUSTICE SEEM LIKE

1 FAIR GAME AND SHOULD BE MINIMAL BURDEN SINCE YOU'VE
2 ALREADY HAD TO GO THROUGH THAT DOCUMENT REVIEW AND
3 DOCUMENT PRODUCTION PROCESS.

4 SO MY INCLINATION AT THIS POINT WOULD BE
5 TO ORDER YOU TO PRODUCE WHATEVER YOU PRODUCED TO
6 D.O.J.

7 ARE THERE ANY OTHER REGULATORY AGENCIES
8 INVOLVED OTHER THAN D.O.J. AND --

9 MR. SAVERI: YOUR HONOR, JOSEPH SAVERI ON
10 BEHALF OF PLAINTIFFS.

11 AS FAR AS WE KNOW -- WE'VE ASKED THE
12 DEFENDANTS THIS QUESTION -- BUT AS FAR AS WE KNOW,
13 THE D.O.J. KIND OF PRODUCTION, INVESTIGATION IS THE
14 ONLY ONE WE'RE AWARE OF.

15 THE COURT: ALL RIGHT.

16 MR. SAVERI: SO THIS KIND OF CORPUS OF
17 DOCUMENTS THAT'S THE D.O.J. PRODUCTION -- WE'RE
18 USING THAT KIND OF SHORTHAND TO TALK ABOUT IT -- IS
19 THE ONLY SET OF DOCUMENTS THAT HAVE BEEN TURNED
20 OVER TO A REGULATORY OR LAW ENFORCEMENT AGENCY THAT
21 WE'RE AWARE OF.

22 THE COURT: UM-HUM. WELL, I'M INCLINED
23 TO ORDER THAT PRODUCTION, BUT TO DENY ALL THE SORT
24 OF MORE OVERBROAD REQUESTS RELATING TO HIRING AND
25 RECRUITING AND THE OTHER REQUESTS UNTIL -- AND WE

1 CAN SORT OF WAIT AND SEE WHAT HAPPENS AT THE
2 JANUARY 26TH MOTION TO DISMISS TO DETERMINE AT THAT
3 POINT WHETHER NOTHING FURTHER BY WAY OF DISCOVERY
4 SHOULD BE PRODUCED UNTIL THE PLAINTIFFS CAN
5 ACTUALLY STATE A CLAIM THAT'S GOING TO SURVIVE A
6 MOTION TO DISMISS, OR AT THAT POINT OPEN THE
7 FLOODGATES, OR JUST WHATEVER, LEAVE THAT FOR A
8 LATER TIME.

9 BUT TO HAVE ONLY THE D.O.J. PRODUCTION
10 THROUGH AT LEAST JANUARY 26TH, AND I'LL HAVE A
11 BETTER IDEA ONCE THE MOTION TO DISMISS IS FULLY
12 BRIEFED WHERE WE GO AFTER JANUARY 26TH.

13 MR. RUBIN: OKAY.

14 THE COURT: SO THAT'S THE CURRENT
15 TENTATIVE.

16 GO AHEAD.

17 MR. RUBIN: OKAY. MAY I?

18 MR. SAVERI: I'M PREPARED TO SUBMIT ON
19 THAT, YOUR HONOR.

20 THE COURT: OKAY.

21 MR. RUBIN: WELL, JUDGE KOH, THANK YOU
22 FOR SHARING YOUR INITIAL THOUGHTS. I'D LIKE TO
23 TAKE A FEW MINUTES TO SEE IF I CAN TURN YOU AROUND
24 ON SOME OF YOUR THOUGHTS.

25 THE COURT: OKAY. GO AHEAD.

1 MR. RUBIN: FIRST OF ALL, WE DO AGREE
2 WITH YOU THAT THE COMPLAINT AS TO THE OVERARCHING
3 CONSPIRACY IS THIN. SO I DID WANT TO POINT OUT
4 THAT'S THE ONE THING THAT WE AGREE ON.

5 I DO THINK THAT'S SIGNIFICANT BECAUSE THE
6 GRAVAMEN OF OUR MOTION IS THAT WHILE IN ANOTHER
7 CASE, AT ANOTHER TIME, THERE COULD BE INDIVIDUAL
8 CLAIMS THAT ONE COULD MAKE AS TO A BILATERAL
9 AGREEMENT BETWEEN TWO COMPANIES, THIS CASE ACTUALLY
10 ALLEGES AN OVERARCHING CONSPIRACY, AND IT MUST
11 BECAUSE THE PLAINTIFF ESSENTIALLY ALLEGES DAMAGES
12 ACROSS THE ENTIRE INDUSTRY.

13 I MEAN, THE ESSENCE OF THEIR CLAIM IS
14 THAT DAMAGES -- IS THAT WAGES WERE SUPPRESSED AND
15 THESE COMPANIES SOMEHOW CREATED THIS ENVIRONMENT
16 WHERE PEOPLE WERE NOT BEING PAID WHAT THEY
17 OTHERWISE WOULD HAVE HAD THESE VERY LIMITED ALLEGED
18 NO COLD CALL ARRANGEMENTS BEEN MADE.

19 THE COURT: UM-HUM.

20 MR. RUBIN: SO TO THE EXTENT THE COURT IS
21 SKEPTICAL ABOUT THE -- ABOUT THE BREADTH OR THE
22 DEPTH OF THE ALLEGATIONS AS TO THE OVERARCHING
23 CONSPIRACY, I THINK THAT IS A PRETTY CLEAR
24 INDICATION THAT THIS COMPLAINT, AS CURRENTLY FRAMED
25 AND AS CURRENTLY CONSTRUCTED, COULD NOT SURVIVE

1 BECAUSE THAT IS THEIR CASE.

2 IN OTHER WORDS, VERY DIFFERENT FROM A
3 CASE -- IF THEY WERE TO BRING ONE AGAINST GOOGLE
4 AND, YOU KNOW, NAME YOUR OTHER COMPANY -- I
5 REPRESENT GOOGLE, SO I'M FREE TO SAY GOOGLE -- FOR
6 SOME KIND OF A BILATERAL ARRANGEMENT THAT SOMEHOW
7 HAD SOME IMPACT. SO --

8 THE COURT: I'M SORRY TO INTERRUPT YOU.
9 IS GOOGLE GOING TO BE THE LEAD ON THIS
10 CASE, AND WHY IS THAT?

11 MR. RUBIN: GOOGLE IS JUST FORTUNATE
12 ENOUGH -- MAYER BROWN WAS JUST FORTUNATE ENOUGH TO
13 TAKE THE LEAD ON THE MOTION TO STAY.

14 THE COURT: I SEE.

15 MR. RUBIN: SO I DON'T THINK THAT WE'VE
16 ACTUALLY DESIGNATED OR ELECTED ANY PARTICULAR
17 COUNSEL TO BE LEAD.

18 THE COURT: OKAY.

19 MR. RUBIN: AND I THINK IT PROBABLY WILL
20 ROTATE AS ISSUES COME UP AND AS PARTICULAR LAW
21 FIRMS TAKE THE LEAD.

22 THE COURT: OKAY.

23 MR. RUBIN: BUT I DID WANT TO FOCUS ON
24 THAT BECAUSE I THINK THAT YOUR VIEWS, YOUR INITIAL
25 VIEWS -- AND OBVIOUSLY THEY HAVE NOT HAD AN

1 OPPORTUNITY TO OPPOSE THE MOTION TO DISMISS -- BUT
2 YOUR INITIAL VIEWS I DO THINK -- GOING BACK TO WHAT
3 YOU RAISED ABOUT TWOMBLY, I DO THINK IT'S
4 SIGNIFICANT BECAUSE TWOMBLY I DO THINK DOES STAND
5 FOR THE FUNDAMENTAL PROPOSITION THAT IN ANTITRUST
6 CASES, THE PLAUSIBILITY OF THE CONSPIRACY IS REALLY
7 SIGNIFICANT, AND THE COURT REALLY WOULD HAVE HAD NO
8 REASON TO RULE AS IT DID.

9 IT WAS A RULE 8 RULING ABOUT WHAT THE
10 PLEADING REQUIREMENTS ARE, AND SOME HAVE ARGUED
11 OVER TIME THAT TWOMBLY JUST CLARIFIED WHAT RULE 8
12 MEANT.

13 THE COURT: UM-HUM.

14 MR. RUBIN: AND OTHERS HAVE SAID, WELL,
15 IT WAS REALLY A NEW RULING.

16 BUT THE ESSENCE OF THE RULING IS THAT YOU
17 HAVE TO HAVE -- TO MEET THIS PLAUSIBILITY TEST
18 BECAUSE ANTITRUST CASES ARE SO COMPLEX AND ARE SO
19 CUMBERSOME.

20 AND I DO WANT TO TURN TO THE D.O.J.
21 ISSUE, BECAUSE I KNOW THAT'S THE FOREFRONT --

22 THE COURT: YEAH, WHY DON'T YOU --

23 MR. RUBIN: AND I'M PREPARED TO ADDRESS
24 IT.

25 THE COURT: -- TALK ABOUT THE PER SE

1 SHERMAN ACT FINDING.

2 MR. RUBIN: WELL, AGAIN, NONE OF THE
3 DEFENDANTS ACTUALLY ADMITTED TO ANY VIOLATION --

4 THE COURT: I UNDERSTAND.

5 MR. RUBIN: -- OF THE ANTITRUST LAWS.

6 THIS WAS A CONSENT DECREE, AND OF COURSE
7 THE TUNNEY ACT, THE STATUTE SPECIFICALLY SAYS
8 THERE'S NO PRIMA FACIE EFFECT FROM THOSE CONSENT
9 DECREES.

10 AND AS WE NOTED IN OUR MOTION TO DISMISS,
11 DEFENDANTS ARE SPECIFICALLY RESERVING THE RIGHT TO
12 ARGUE, WHICH WE WILL, I THINK QUITE VIGOROUSLY,
13 THAT THIS IS REALLY APPROPRIATELY A RULE OF REASON
14 CASE AS ALL THE FACTS PLAY OUT, THAT IT SHOULD NOT
15 BE JUDGED AS A PER SE CASE.

16 BUT WE'LL GET TO THAT IN DUE COURSE.

17 THE COURT: OKAY.

18 MR. RUBIN: BUT IN TERMS OF THE D.O.J.
19 PRODUCTION, I THINK THE COURT IS RIGHT THAT COURTS
20 DO CONSIDER BURDEN IN CONSIDERING WHETHER A MOTION
21 TO STAY OR A TEMPORARY STAY IS APPROPRIATE.

22 AND HERE THERE REALLY IS STILL A BURDEN,
23 AND LET ME TRY TO EXPLAIN IN A FEW MINUTES WHY.

24 THE COURT: OKAY.

25 MR. RUBIN: THE D.O.J. PRODUCTION WAS A

1 PRODUCTION THAT IS VERY DIFFERENT IN TIME, OR AT
2 LEAST SOMEWHAT DIFFERENT IN TIME SCOPE.

3 SO THE CIVIL INVESTIGATIVE DEMANDS THAT
4 THE DEFENDANTS RECEIVED ARE BROADER IN SCOPE
5 ACTUALLY EVEN THAN THE, THAN THE REQUESTS ON THEIR
6 FACE THAT HAVE BEEN SERVED BY THE PLAINTIFFS, AND
7 CERTAINLY MUCH BROADER THAN THE CLASS ALLEGATIONS
8 OF A CLASS PERIOD FROM JANUARY 2005 TO 2010.

9 SO IN THE FIRST INSTANCE, YOU HAVE
10 PORTIONS OF THE D.O.J. PRODUCTION THAT GO INTO
11 DOCUMENTS THAT ARE, ARE BROADER IN SCOPE.

12 THE COURT: AND HOW ARE THEY BROADER IN
13 SCOPE?

14 MR. RUBIN: WELL, I THINK, FOR EXAMPLE,
15 AGAIN SPEAKING FOR GOOGLE, AND I THINK THIS IS TRUE
16 FOR MOST COMPANIES, I THINK IT GOES BACK TO JANUARY
17 OF 2000, AND I BELIEVE THE CIVIL -- I BELIEVE THE
18 PLAINTIFFS' REQUEST GOES TO 2001.

19 AND ONE OF THE THINGS THAT WE WOULD
20 ARGUE, YOUR HONOR, IS THAT IT SHOULD, AT MOST, AT
21 MOST GO BACK A YEAR BEFORE THE CLASS.

22 I MEAN, IN MY EXPERIENCE IN ANTITRUST
23 LITIGATION, OFTENTIMES THE COURT WILL ALLOW
24 DISCOVERY PERHAPS SIX MONTHS, 12 MONTHS BEFORE THE
25 BEGINNING OF THE ALLEGED CONSPIRACY, BUT CERTAINLY

1 NOT BEFORE THAT.

2 SO THAT IS JUST THE FIRST OF MANY ISSUES
3 WHERE WE WOULD ACTUALLY TAKE ISSUE EVEN WITH THE
4 SCOPE OF THE D.O.J. PRODUCTION.

5 AND TO BACK UP, IT IS TRUE THAT --

6 THE COURT: I'M SORRY TO INTERRUPT YOU,
7 BUT YOUR D.O.J. PRODUCTION WENT FROM JANUARY OF
8 2000 THROUGH WHAT DATE?

9 MR. RUBIN: I BELIEVE THOSE -- THE CIVIL
10 INVESTIGATIVE DEMAND WAS SERVED IN THE SPRING OF
11 2009, SO TO THE EXTENT DOCUMENTS EXISTED AT THAT
12 TIME.

13 SO THERE IS NO PREDETERMINED RIGHT FOR A
14 PLAINTIFF WHO'S FOLLOWING ON A GOVERNMENT
15 ENFORCEMENT ACTION TO NECESSARILY BE ENTITLED TO
16 ALL THE DOCUMENTS THAT WERE PRODUCED BECAUSE, OF
17 COURSE, THE GOVERNMENT AGENCY MAY BE INVESTIGATING
18 AND LOOKING INTO A NUMBER OF THINGS.

19 THEY MAY HAVE A TIME SCOPE THAT'S VERY
20 DIFFERENT THAN WHAT IS ACTUALLY ALLEGED IN THE
21 COMPLAINT.

22 THEY MAY HAVE, AND IN FACT I BELIEVE --
23 IT'S CERTAINLY TRUE --

24 THE COURT: CAN WE -- I'M SORRY TO
25 INTERRUPT YOU, BUT I'D LIKE TO BREAK THIS DOWN.

1 MR. RUBIN: SURE.

2 THE COURT: LET ME HEAR FROM MR. SAVERI.

3 WHY SHOULDN'T I LIMIT IT TO THE D.O.J.

4 DOCUMENTS PRODUCED FROM -- WHAT DID YOU SAY? -- SIX
5 MONTHS TO A YEAR BEFORE JUNE 2005? SO 2004 --

6 MR. RUBIN: THAT WOULD BE WHAT I WOULD
7 PREFER, BUT THAT'S GENERALLY WHAT I --

8 THE COURT: -- THROUGH 2009.

9 MR. SAVERI: JUDGE, A COUPLE THINGS.

10 SO I THINK THE -- FIRST OF ALL, THE --
11 THE DEPARTMENT OF JUSTICE -- WE DON'T KNOW WHAT THE
12 DEPARTMENT OF JUSTICE ACTUALLY ASKED FOR BECAUSE WE
13 HAVEN'T SEEN ANY OF THAT.

14 BUT THE DEPARTMENT OF JUSTICE COULD HAVE
15 INITIALLY, AND LIKELY DID, ASK FOR A BROAD TIME
16 PERIOD.

17 BUT WE DON'T KNOW, BECAUSE WE'RE NOT PART
18 OF THAT, ACTUALLY WHAT THE DEFENDANTS AGREED WITH
19 THE DEPARTMENT OF JUSTICE TO PRODUCE.

20 SO I DON'T -- FIRST OF ALL, I DON'T
21 BELIEVE, AND THERE'S NOTHING IN THE RECORD THAT
22 SUGGESTS, THAT THE -- THAT OUR REQUESTS ARE
23 ANYTHING BUT MORE NARROW THAN WHAT THE DEPARTMENT
24 OF JUSTICE EVENTUALLY GOT FROM THE DEFENDANTS.

25 IT'S ONE THING TO ASK FOR A BROAD

1 REQUEST. THAT COULD HAVE BEEN SUBSTANTIALLY
2 NARROWED BY THE BACK AND FORTH BETWEEN THE
3 DEPARTMENT OF JUSTICE AND THESE COMPANIES. WE
4 DON'T KNOW ANYTHING ABOUT THAT.

5 BUT EVEN ASSUMING THAT THE DEPARTMENT OF
6 JUSTICE PRODUCTION WAS MORE BROAD, ALL WE'VE HEARD
7 IS THAT IT MAY BE A LITTLE BIT MORE BROAD IN
8 TIMING.

9 MR. RUBIN: WELL, I HAVEN'T FINISHED,
10 BUT --

11 MR. SAVERI: EXCUSE ME.

12 AND THE -- IT IS CLEAR, I THINK, THAT THE
13 REQUESTS FROM THE DEPARTMENT OF JUSTICE ASKED FOR
14 DOCUMENTS THAT RELATE TO SOME OF THE VERY SPECIFIC
15 AGREEMENTS AND VIOLATIONS OF THE ANTITRUST LAWS
16 THAT ARE SPECIFICALLY ALLEGED IN OUR COMPLAINT.

17 SO -- AND -- SO ALSO, WITH RESPECT TO
18 BURDEN, IN SOME WAYS I THINK THE BURDEN ARGUMENT IS
19 NOW COMPLETELY INVERTED BECAUSE, IN FACT, IT WOULD
20 BE MORE BURDENSOME TO GO THROUGH THE DEPARTMENT OF
21 JUSTICE DOCUMENTS AND PULL THINGS OUT THAT MIGHT
22 PRECEDE AN ARBITRARY TIME LIMIT. THAT'S ONE POINT.

23 SECOND, WE WOULD ARGUE THAT EVEN IF THERE
24 WERE SOME DOCUMENTS THAT ACTUALLY DID PRECEDE -- WE
25 TRIED TO BE NARROW IN OUR REQUESTS IN TIME.

1 EVEN IF THERE WERE SOME DOCUMENTS THAT
2 MIGHT HAVE BEEN CREATED BEFORE WHAT WE KNEW, WHAT
3 WE ALLEGED, IT SEEMS TO ME WHAT THAT MEANS IS THAT
4 THE CONSPIRACY THAT WE'VE ALLEGED IS, IS TOO NARROW
5 BECAUSE WE DON'T HAVE ALL THE FACTS.

6 IF THE FACTS IN DISCOVERY SHOW, FOR
7 EXAMPLE, THAT THE AGREEMENTS ACTUALLY STARTED MORE
8 EARLY, I MEAN, OF COURSE THOSE ARE -- THAT'S
9 INFORMATION THAT WE'RE ENTITLED TO KNOW. YOU KNOW,
10 IF THE CONSPIRACY STARTED EARLIER, WE'RE ENTITLED
11 TO KNOW THAT.

12 SO FROM OUR PERSPECTIVE, THE DATE PERIOD
13 IS KIND OF AN ARBITRARY, KIND OF NOT VERY
14 SIGNIFICANT REASON FOR NOT PRODUCING THE DEPARTMENT
15 OF JUSTICE MATERIALS WHEN I THINK WE CAN AGREE THAT
16 THE DEPARTMENT OF JUSTICE MATERIALS ARE DIRECTLY
17 RELATED TO THE ALLEGATIONS IN THE COMPLAINT.

18 IT WILL SIGNIFICANTLY ADVANCE OUR CASE.
19 IT WILL ALLOW US TO FOCUS AND TAILOR SUBSEQUENT
20 DISCOVERY BY IDENTIFYING WITNESSES, SPECIFIC
21 PARTICIPANTS IN MEETINGS AND CONVERSATIONS.

22 IT WILL HELP US FOCUS WHAT'S GOING
23 FORWARD IN THE CASE.

24 THE COURT: WELL, LET ME SHARE WHAT I
25 THINK IS SORT OF A BALANCING ISSUE.

1 I MEAN, IN GENERAL I WANT THE CASE TO
2 MOVE BECAUSE MOST LIKELY EVEN IF I GRANT A MOTION
3 TO DISMISS IN JANUARY, WE'RE IN THE NINTH CIRCUIT,
4 I WOULD GIVE LEAVE TO AMEND, AND THEN WE MIGHT BE
5 IN ANOTHER ROUND OF MOTION TO DISMISS SOMETIME IN
6 THE LATE SPRING.

7 THE FIRST CASE WAS FILED IN MAY OF 2011,
8 AND I DON'T WANT US TO HAVE A WHOLE 12 MONTHS GO BY
9 BEFORE DISCOVERY HAS STARTED.

10 SO THAT'S WHY I WANT SOME DISCOVERY TO
11 PROCEED.

12 ON THE OTHER HAND, IF YOU'RE GOING TO
13 HAUL IN ALL THESE COMPANIES AND MAKE THEM PAY ALL
14 OF THIS MONEY FOR THEIR DEFENSE, YOU SHOULD KNOW
15 WHAT YOUR ALLEGATIONS ARE AND NOT HAVE TO GET IT
16 OUT OF DISCOVERY.

17 I DON'T THINK IT'S FAIR, IF YOU CAN'T
18 STATE A CLAIM, TO FISH FOR ONE IN THE DISCOVERY.

19 SO --

20 MR. SAVERI: AND YOUR HONOR --

21 THE COURT: THERE'S A CONFLICTING SORT OF
22 BALANCING GOING ON HERE IN THAT I THINK IT'S NOT
23 PROPER IF YOU NEED THE DISCOVERY TO STATE A
24 CLAIM --

25 MR. SAVERI: BUT THE --

1 MR. RUBIN: MIGHT I SAY --

2 MR. SAVERI: EXCUSE ME.

3 THE COURT: YEAH.

4 MR. SAVERI: JUST SO WE'RE CLEAR, I MEAN,
5 I'M NOT SAYING THAT WE NEED DISCOVERY TO FIGURE OUT
6 WHAT OUR CLAIM IS.

7 I MEAN, I THINK THAT WHEN YOU -- WHEN YOU
8 LOOK AT OUR COMPLAINT, IF YOU HAVEN'T ALREADY, AND
9 WE HAVE AN OPPORTUNITY TO TALK ABOUT THE ARGUMENTS
10 THAT THE DEFENDANTS RAISE, WE WILL SHOW YOU THAT
11 THAT 35-PAGE COMPLAINT IS MORE THAN SUFFICIENT TO
12 MEET THE STANDARDS OF RULE 12 AND RULE 8.

13 THE COURT: BUT OTHER THAN --

14 MR. SAVERI: BUT --

15 THE COURT: BUT OTHER THAN PIXAR WITH
16 LUCASFILM, APPLE WITH GOOGLE, WHAT DO YOU HAVE THAT
17 SHOWS THAT THERE WAS AN OVERALL CONSPIRACY
18 THROUGHOUT ALL THESE INDUSTRIES NOT TO POACH EACH
19 OTHER'S --

20 MR. SAVERI: YOUR HONOR, I MEAN, IT'S
21 CLEAR, BECAUSE OF THE WAY ANTITRUST CONSPIRACIES
22 WORK, THAT THE PLAINTIFFS THAT WERE AFFECTED BY
23 THESE AGREEMENTS WERE NOT INVITED TO THE MEETINGS
24 AND WERE NOT PART OF THE -- THEY WEREN'T DIRECT
25 WITNESSES TO THE CONSPIRACY.

1 WE HAVE EVIDENCE WHICH INCLUDES MATERIALS
2 THAT WERE -- THERE'S SOME MATERIALS IN THE POPULAR
3 PRESS.

4 WE'VE GOT THE FACT OF THE AGREEMENTS
5 THEMSELVES, WHICH -- I REALLY CAN'T TELL WHETHER
6 THE DEFENDANTS ARE GOING TO DEFEND THIS CASE SAYING
7 THAT THOSE AGREEMENTS THAT THEY -- THAT THE
8 GOVERNMENT FOUND OUT ABOUT AND THEY ACTUALLY
9 ENTERED CONSENT DECREES ON, I DON'T KNOW IF THIS
10 HAPPENED OR NOT, BUT I'VE GOT --

11 THE COURT: DO YOU HAVE ALL THE
12 AGREEMENTS?

13 MR. SAVERI: DO WE -- I DON'T -- WE HAVE
14 WHAT WE HAVE.

15 I MEAN, YOU KNOW, I THINK THAT IN OUR
16 COMPLAINT, WE HAVE A SPECIFIC -- WE HAVE AN
17 AGREEMENT ALLEGED, A VERY SPECIFIC AGREEMENT
18 ALLEGED BETWEEN EACH OF THE DEFENDANTS --

19 THE COURT: UM-HUM.

20 MR. SAVERI: -- ONE OR MORE OF THE
21 DEFENDANTS.

22 THERE MAY BE -- FRANKLY, ALL I WANT TO
23 SAY IS THAT THERE MAY BE OTHERS THAT DISCOVERY WILL
24 SHOW.

25 I MEAN, WE HAVEN'T SEEN ANY DOCUMENTS YET

1 AND THIS IS AN ANTITRUST CONSPIRACY CASE.

2 AND ONE OF THE THINGS THAT I THINK THE
3 DEPARTMENT OF JUSTICE PRODUCTION WILL DO IS HELP US
4 BEGIN TO UNDERSTAND THAT.

5 NOW --

6 THE COURT: HOW DID YOU PICK JANUARY 1 OF
7 2005 AS THE STARTING POINT FOR YOUR CLASS? WHAT'S
8 THE SIGNIFICANCE OF THAT DATE?

9 MR. SAVERI: IT'S -- IT'S FOUR YEARS
10 BEFORE JANUARY 1, 2009, AND IT WAS -- IT -- WE
11 DON'T HAVE ANY -- WE DO NOT HAVE A DOCUMENT WHICH
12 SHOWS EXACTLY WHEN THE FIRST CONTACT HAPPENED, WHEN
13 THE CONSPIRACY WAS INITIATED, WHEN THE FIRST PHONE
14 CALL CAME FROM STEVE JOBS OR WHOEVER STARTED IT TO
15 WHOEVER THE FIRST PERSON HE TALKED TO WAS AND SAID
16 "I WANT -- I WANT TO ENTER INTO THIS AGREEMENT TO
17 RESTRICT COMPETITION."

18 THE COURT: UM-HUM.

19 MR. SAVERI: IT'S A RARE THING, INDEED,
20 FOR AN ANTITRUST CLAIMANT TO HAVE THAT DOCUMENT.

21 I MEAN, WHAT WE HAVE AN OBLIGATION TO DO
22 UNDER THE FEDERAL RULES IS TO PUT THE PLAINTIFFS --
23 PUT THE DEFENDANTS ON NOTICE OF THE CLAIMS AGAINST
24 THEM, AND DO IT IN A SPECIFIC WAY THAT MEETS THE
25 TWOMBLY REQUIREMENTS, AND I WOULD SUBMIT THAT WE'VE

1 DONE THAT IN OUR COMPLAINT.

2 SO TO ANSWER YOUR QUESTION DIRECTLY, WE
3 DO NOT HAVE THE FIRST MEETING, I DON'T HAVE THE
4 E-MAIL THAT WAS SENT, OR I DON'T HAVE THE NOTES OF
5 THE TELEPHONE CALL WHICH WAS THE FIRST CONTACT.

6 SO IT COULD HAVE HAPPENED EARLIER, BUT WE
7 DO NOT KNOW.

8 THE COURT: LET ME -- OTHER THAN TYING,
9 WHAT ARE YOUR OTHER -- GO AHEAD.

10 MR. RUBIN: WELL, LET -- I WANT TO GO
11 THROUGH THIS, BUT I DO WANT TO ADDRESS ONE POINT
12 THAT MR. SAVERI MADE.

13 HE TALKED ABOUT THE BURDEN OF GOING
14 THROUGH THE PRODUCTION THAT WE'VE ALREADY MADE.

15 BUT, FRANKLY, THAT'S OUR RIGHT. I MEAN,
16 WE'RE ENTITLED TO PRODUCE ONLY THOSE DOCUMENTS THAT
17 ARE RELEVANT WITHIN THE FEDERAL RULES OF CIVIL
18 PROCEDURE.

19 SO IT'S -- THE ISSUE IS NOT, "OH, IT'S
20 MORE OF A BURDEN -- JUST GIVE US EVERYTHING YOU
21 GAVE TO D.O.J. WHO CARES ABOUT TIME LIMITATIONS?
22 WHO CARES WHETHER IT INVOLVES BUSINESS ARRANGEMENTS
23 THAT HAVE NOT A WHIT TO DO WITH THIS CASE? JUST
24 PRODUCE IT BECAUSE IT'S EASIER."

25 BUT THOSE AREN'T THE RULES. THE RULES

1 ARE, EVEN IF WE MADE A PRIOR PRODUCTION, WE'RE
2 ENTITLED TO STATE OBJECTIONS AND HAVE -- AND
3 PRODUCE ONLY THOSE DOCUMENTS THAT ARE RELEVANT TO
4 THIS CASE.

5 AND, YOUR HONOR, I THINK TAKING A STEP
6 BACK IN TERMS OF BURDEN, WHICH I THINK -- BURDEN
7 AND PREJUDICE, WHICH I THINK IS EXACTLY WHAT THE
8 COURT HAS TO CONSIDER, IF YOU ACTUALLY COMPARE THE
9 BURDEN ON THE PLAINTIFFS OF WAITING TWO AND A
10 HALF -- TWO, TWO AND A HALF MONTHS UNTIL THE COURT
11 HAS A FULL AND COMPLETE OPPORTUNITY TO RULE ON THE
12 MOTION, TO CONSIDER WHETHER THIS OVERARCHING
13 CONSPIRACY THEORY ACTUALLY HAS THE UNDERLYING
14 ESSENTIAL SPECIFIC FACTS, NOT CONCLUSORY
15 ALLEGATIONS, BUT SPECIFIC FACTS TO PROCEED, THERE'S
16 NO BURDEN. THERE'S EFFECTIVELY NO BURDEN.

17 THE ONLY BURDEN ON THEM, AS YOUR HONOR
18 STATED, IS THAT THEY DON'T GET ADDITIONAL FACTS TO
19 AMEND THEIR COMPLAINT.

20 BUT THAT'S NOT A RIGHT UNDER THE FEDERAL
21 RULES OF CIVIL PROCEDURE. THERE'S A SPECIFIC RULE
22 ABOUT PRE-SUIT DISCOVERY, AND THAT'S NOT THIS CASE.

23 SO THERE IS NO ACTUAL RIGHT TO SAY, "I
24 FILED A COMPLAINT. BECAUSE OF CNC AND RULE 26
25 RULES, THE TIME FOR DISCOVERY HAS BEGUN AND I'M

1 ENTITLED TO GET DOCUMENTS SO THAT MAYBE I CAN FLESH
2 OUT MY COMPLAINT," THERE IS NO RIGHT TO THAT.

3 SO THERE'S NO BURDEN ON THEM TO WAIT THE
4 COUPLE MONTHS.

5 ON US, IT IS SOME BURDEN. WE DO HAVE A
6 RIGHT, AND WE WOULD BELIEVE THAT IT IS INCUMBENT ON
7 US TO GO THROUGH OUR D.O.J. PRODUCTION AND LOOK AT
8 THE TIMING OF IT.

9 AS ANOTHER EXAMPLE, THERE ARE BUSINESS
10 ARRANGEMENTS THAT WERE INVOLVING NON-DEFENDANTS
11 THAT WERE PART OF EVERYBODY'S PRODUCTIONS.

12 THOSE WELL MAY HAVE BEEN MUCH MORE
13 NARROWLY TAILORED, THEY COULD HAVE HAD OTHER
14 ASPECTS OF THEM, WHICH IS WHY THEY DIDN'T
15 ULTIMATELY APPEAR IN THE D.O.J. CONSENT DECREE.

16 WE WOULD SAY TO YOU TODAY, PRESUMPTIVELY
17 AT LEAST, THOSE AREN'T RELEVANT.

18 NOW, THEY MAY HAVE AN ARGUMENT WHY THEY
19 ARE.

20 BUT THAT'S ALL PART OF MOTION PRACTICE.

21 SO IT'S NOT JUST SO SIMPLE TO SAY,
22 "HERE'S MY CD IN MY BRIEFCASE, I CAN JUST HAND IT
23 OVER," BECAUSE THESE ARE ALL VERY SIGNIFICANT
24 ISSUES THAT THE DEFENDANTS HAVE -- SHOULD HAVE A
25 FULL RIGHT TO OBJECT TO AND TO TAILOR, EVEN THOUGH

1 IT'S ALREADY BEEN PRODUCED.

2 IN SOME RESPECTS, YOUR HONOR, YOU CAN
3 JUST THINK OF THIS AS PERHAPS A HALF STEP BEYOND
4 WHERE WE MIGHT OTHERWISE BE IF WE RAN SOME SEARCH
5 TERMS AND THEN HAD THIS GROUP OF DOCUMENTS. THAT'S
6 ESSENTIALLY ALL WE'VE DONE.

7 BUT THERE'S NO PRESUMPTION OF
8 ENTITLEMENT. THERE'S NOTHING IN THE LAW THAT SAYS
9 BECAUSE YOU PRODUCED --

10 THE COURT: WELL, I'M NOT GOING TO -- YOU
11 KNOW, THE FIRST PLAINTIFF FILED THEIR COMPLAINT ON
12 MAY 4TH OF 2011. I'M NOT GOING TO MAKE THAT PERSON
13 WAIT NINE MONTHS UNTIL THEY GET ANY DISCOVERY.

14 THIS IS NOT A SECURITIES CASE, AND I WANT
15 MY CASES TO MOVE, SO I'M NOT GOING TO HAVE NOBODY
16 GOING FORWARD.

17 MR. RUBIN: I MEAN, IF YOUR HONOR SAID,
18 YOU KNOW, THE SPECIFIC AGREEMENTS, THE SPECIFIC
19 AGREEMENTS THAT ARE -- YOU KNOW, IF THE COURT
20 THINKS THAT SOME LIMITED DISCOVERY SHOULD TAKE
21 PLACE, LIKE DOCUMENTS RELATING TO THE SPECIFIC
22 AGREEMENTS THAT ARE ALLEGED IN THE COMPLAINT, OKAY.

23 I BELIEVE THE COURT IS EXACTLY RIGHT.
24 THEY STATED A CLAIM. THEY HAVE SPECIFIC AGREEMENTS
25 THAT ARE ALLEGED. THAT IS THE CASE.

1 THAT IS THE QUESTION NOW BEFORE THE
2 COURT. DID THEY STATE A VIABLE CAUSE OF ACTION?

3 AND TO THE EXTENT ANY DISCOVERY WERE TO
4 PROCEED, IT REALLY SHOULD BE TAILORED TO THAT.

5 IT'S NOT A QUESTION OF, "OH, YOU'VE
6 ALREADY PRODUCED DOCUMENTS, SO JUST GO AHEAD AND
7 REPLICATE THAT OR COPY IT."

8 THE COURT: WELL, BUT WHAT YOU'RE CITING
9 TO THE TWOMBLY DICTA IS, WHAT, EXPENSE,
10 INTRUSIVENESS, BURDEN? ISN'T THAT WHAT THE SUPREME
11 COURT --

12 MR. RUBIN: CERTAINLY.

13 THE COURT: -- SAID WAS THE REASON WHY IN
14 THAT PARTICULAR CASE --

15 MR. RUBIN: BUT -- AND WHAT I'M TRYING TO
16 ARTICULATE IS THAT EVEN WITH THE PRODUCTION THAT WE
17 HAVE, EVEN WITH THIS GROUP OF DOCUMENTS THAT GOOGLE
18 AND OTHERS HAVE PRODUCED, UNDER THE RULES OF
19 DISCOVERY, WE WOULD BE ENTITLED -- AND I THINK WE
20 WOULD BE DERELICT IF WE DIDN'T -- TO TAILOR THOSE
21 DOCUMENTS, FILTER THOSE DOCUMENTS IF YOU WILL, TO
22 ONLY -- TO RESPOND ONLY TO THOSE DOCUMENT REQUESTS
23 THAT WE THINK ARE RELEVANT TO THIS CASE, WHICH
24 REQUIRES WORK, WHICH REQUIRES TIME.

25 I MEAN, MR. SAVERI SAYS, "WELL, YOU CAN

1 JUST IGNORE THAT AND THAT GETS RID OF THE BURDEN,"
2 BUT THAT IS SOMETHING THAT WE HAVE AN ENTITLEMENT
3 TO DO.

4 WE'RE NOT REQUIRED TO JUST DUMP A
5 PREVIOUS PRODUCTION IN TO THE PLAINTIFFS.

6 WE ARE ONLY REQUIRED TO PROVIDE WHAT THE
7 COMPLAINT CALLS FOR THAT WOULD BE RELEVANT FOR THIS
8 CASE AT THIS TIME.

9 SO IT WOULD ACTUALLY TAKE TIME. I THINK
10 IF YOU MULTIPLIED IT BY THE SIX OR SEVEN
11 DEFENDANTS, THERE'S A PRETTY SUBSTANTIAL BURDEN FOR
12 US TO GO THROUGH OUR D.O.J. PRODUCTION, MAKE THE
13 OBJECTIONS AS TO TIME, AS TO NON-DEFENDANT
14 DOCUMENTS THAT MIGHT HAVE BEEN PART OF THE
15 PRODUCTION, AS TO OTHER ISSUES RELATING TO POLICIES
16 THAT I DON'T THINK NECESSARILY ARE RAISED IN THE
17 COMPLAINT THAT MAY HAVE BEEN ASKED FOR BY D.O.J.,
18 THAT IS A TIME AND BURDEN EXPENSE IN EVERY WAY THAT
19 DISCOVERY WOULD BE.

20 THE ONLY THING THAT'S MISSING IS WE DON'T
21 HAVE TO DO THE SEARCH TERMS. WE'VE ALREADY DONE
22 THOSE.

23 BUT IN ALL OTHER RESPECTS, WE STILL HAVE
24 TO DO THE SAME FILTERING.

25 SO I UNDERSTAND THE COURT'S CONCERN.

1 JANUARY COMES ALONG AND IT'S NINE MONTHS.

2 BUT FRANKLY, WHEN YOU THINK ABOUT THE
3 HISTORY OF THIS CASE, THEY FILED IN STATE COURT AND
4 IT WAS REMOVED TO FEDERAL COURT.

5 FROM THE TIME THAT THERE HAS BEEN AN
6 AGREEMENT TO HAVE THIS CASE IN FEDERAL COURT AND
7 IT'S BEEN BEFORE YOU, IT REALLY HASN'T BEEN THAT
8 MUCH TIME. SO --

9 THE COURT: WELL, THE CONSOLIDATED
10 AMENDED COMPLAINT WAS FILED SEPTEMBER 13TH, SO
11 STILL.

12 MR. RUBIN: RIGHT.

13 THE COURT: I'M JUST -- I'M TELLING YOU,
14 I'VE GOT TOO MANY CASES TO LET THEM LANGUISH AND
15 NOT HAVE DISCOVERY FOR NINE MONTHS TO A YEAR. I'M
16 JUST NOT GOING TO DO THAT. OKAY?

17 SO UNLESS YOU HAVE ANY OTHER OBJECTION
18 OTHER THAN TIME PERIOD, TIMEFRAME --

19 MR. RUBIN: WELL, I DID. I RAISED THE
20 NON-DEFENDANTS. THERE WERE DOCUMENTS THAT WERE
21 PRODUCED RELATING TO NON-DEFENDANTS IN THIS CASE.

22 THE COURT: OKAY.

23 MR. RUBIN: OTHER KINDS OF BUSINESS
24 ARRANGEMENTS THAT RAISED CONFIDENTIALITY ISSUES
25 WITH RESPECT TO THOSE COMPANIES, AND --

1 THE COURT: NOW, DID YOU ALREADY -- TO
2 MAKE THE PRODUCTION TO D.O.J., I ASSUME YOU HAVE
3 SOME KIND OF CONFIDENTIALITY AGREEMENT WHERE YOU
4 HAVE TO GIVE THEM NOTICE THAT YOU'RE HAVING TO MAKE
5 THIS PRODUCTION AND YOU GIVE THEM A CERTAIN PERIOD
6 TO SEE IF THEY WANT TO FILE A MOTION FOR PROTECTIVE
7 ORDER.

8 DID YOU GET THEIR CONSENT TO MAKE THE
9 PRODUCTION TO D.O.J.?

10 MR. RUBIN: I DON'T KNOW THE DETAILS OF
11 THAT, YOUR HONOR. I APOLOGIZE.

12 I DON'T KNOW WHETHER ANYONE ELSE IS AWARE
13 OF THAT OR NOT.

14 MR. SAVERI: YOUR HONOR --

15 THE COURT: ALL RIGHT. BUT I'M ASSUMING
16 THAT IF THERE IS SOME THIRD PARTY CONFIDENTIALITY
17 OBLIGATION, THE PLAINTIFFS UNDERSTAND THAT THE
18 DEFENDANTS HAVE TO HONOR THAT.

19 IF THEY DIDN'T GET A BLANKET CONSENT TO
20 MAKE THEIR D.O.J. PRODUCTION AND NEED TO GO BACK
21 AND SAY "WE NEED TO PRODUCE IT FOR THIS SPECIFIC
22 INSTANCE, CAN WE," THEN --

23 MR. RUBIN: BUT, YOUR HONOR, I GUESS
24 RECOGNIZING YOUR CONCERN ABOUT MOVING FORWARD, IN
25 MY VIEW, IF THERE IS ANYTHING TO BE PRODUCED,

1 SOMETHING THAT WOULD AT LEAST MINIMIZE THE BURDEN
2 FOR DEFENDANTS TO AT LEAST BALANCE THE EQUATION
3 HERE, TO PROVIDE --

4 THE COURT: YOU'RE MAKING ME THINK
5 THERE'S SOME REALLY GOOD STUFF HERE.

6 MR. SAVERI: YEAH, ABSOLUTELY.

7 MR. RUBIN: NO, NO, NO. I'M JUST SAYING
8 THE --

9 THE COURT: THAT'S THE IMPRESSION I'M
10 GETTING IF YOU'RE FIGHTING THIS HARD AND MAKING ALL
11 THESE MOTIONS.

12 MR. RUBIN: NO, NO. I'M JUST SAYING IT'S
13 RELATIVELY EASY AND RELATES TO THEIR COMPLAINT TO
14 PROVIDE DOCUMENTS RELATING TO THE BILATERAL
15 AGREEMENTS THAT ARE AT ISSUE.

16 I'M ONLY LOOKING FOR SOMETHING SO THAT WE
17 WOULDN'T HAVE TO DO ALL THE OTHER FILTERING, AND
18 THAT'S SQUARELY ON POINT. THOSE ARE, I THINK,
19 RELATED TO THIS CASE.

20 THE COURT: OKAY.

21 MR. RUBIN: AND DOCUMENTS RELATED TO
22 APPLE AND GOOGLE, PIXAR, LUCASFILM, THOSE DOCUMENTS
23 ARE RELATED TO THE CASE, AND I THINK WITH AT LEAST
24 RELATIVE EASE, NOT, YOU KNOW, COMPLETELY WITHOUT
25 BURDEN, BUT WITH RELATIVE EASE WE COULD SAY "WE

1 WILL START OUR PRODUCTION THAT WILL BE SORT OF A
2 FIRST TRANCHE. THOSE DOCUMENTS ARE RELATED TO
3 THOSE AGREEMENTS."

4 BUT OTHERWISE WE SHOULD WAIT UNTIL THE
5 COURT RULES BECAUSE THEN YOU START MOVING INTO
6 OTHER AREAS.

7 IT REALLY HAS LITTLE --

8 THE COURT: WELL, NO. THAT'S TOO NARROW.
9 I'M NOT GOING TO DO THAT.

10 MR. SAVERI: IF YOU WANT TO --

11 THE COURT: LET ME HEAR A SHORT ANSWER ON
12 THE THIRD PARTIES.

13 IF THEY HAVE CONFIDENTIALITY OBLIGATIONS,
14 I'M NOT GOING TO ORDER THEM TO DISREGARD THOSE.

15 MR. SAVERI: SO, YOUR HONOR, THAT'S FAIR.

16 THE COURT: YEAH.

17 MR. SAVERI: AND I HAVE TWO SPECIFIC,
18 MAYBE THREE SPECIFIC THINGS TO SAY ABOUT THAT.

19 FIRST, WE HAVE -- WE WILL AGREE -- WELL,
20 LET ME SAY IT IN THIS WAY: FIRST OF ALL, WE, SOME
21 TIME AGO IN SEPTEMBER, PROPOSED A PROTECTIVE ORDER
22 TO THE DEFENDANTS THAT WOULD GOVERN CONFIDENTIAL
23 INFORMATION.

24 I THINK IT WOULD BE REALLY USEFUL FOR THE
25 DEFENDANTS TO GET BACK TO US SO WE CAN GET AN ORDER

1 ENTERED IN THIS CASE SO WE WOULDN'T HAVE TO HAVE
2 THIS DISCUSSION NOW, AND THERE'S REALLY NO REASON
3 AND NO EXCUSE FOR THE DEFENDANTS NOT TO HAVE DONE
4 THAT, PARTICULARLY BECAUSE THE ORDER THAT WE USED
5 AND SENT TO THEM WAS ESSENTIALLY MODELED AFTER THE
6 NORTHERN DISTRICT'S ORDER THAT IS ON THEIR WEBSITE.
7 SO THAT'S ONE POINT.

8 SECOND, WITH RESPECT TO THIRD PARTIES WHO
9 HAVE AN ARGUABLE CONFIDENTIALITY CONCERN, IF, IN
10 FACT, THEY PRODUCED THEM TO THE DEPARTMENT OF
11 JUSTICE IN SOME FASHION WHERE THEY SAID "THESE ARE
12 THIRD PARTY DOCUMENTS AND THEY ARE CONFIDENTIAL,"
13 WE WILL, OF COURSE, RESPECT THAT AND GIVE THE THIRD
14 PARTIES WHATEVER PROCESS THAT THEY AGREED TO TO
15 PROTECT THEM.

16 IN THE INTERIM --

17 THE COURT: NO, NO, NO. THEY HAVE TO
18 PROBABLY, IN ADVANCE, BEFORE THE PRODUCTION TO YOU,
19 GO BACK TO THOSE THIRD PARTIES, IF THEY DIDN'T GET
20 A BLANKET CONSENT THE LAST TIME, AND SAY "WE ARE
21 NOW MAKING A PRODUCTION TO PLAINTIFF'S COUNSEL."

22 MR. RUBIN: BUT I --

23 MR. SAVERI: EXCUSE ME.

24 IF THEY WERE TURNED OVER TO THE
25 DEPARTMENT OF JUSTICE WITHOUT SOME KIND OF

1 PROTECTION, I WOULD SAY THAT, YOU KNOW, THAT HORSE
2 HAS LEFT THE BARN.

3 BUT WITH RESPECT TO THE PRODUCTION TO US,
4 WE WILL CERTAINLY AGREE, FOR THESE PURPOSES, TO
5 KEEP THOSE DOCUMENTS WITH THE HIGHEST
6 CONFIDENTIALITY. WE WILL LIMIT OUR USE OF THEM.

7 I MEAN, JUST SO WE'RE CLEAR --

8 THE COURT: NO, NO, NO. THAT'S NOT WHAT
9 I'M TALKING ABOUT.

10 I'M TALKING ABOUT THE CONFIDENTIALITY
11 AGREEMENT THAT THESE COMPANIES MAY HAVE WITH THEIR
12 LICENSEES OR THEIR SUBLICENSEES THAT SAYS THAT IF
13 YOU'RE GOING TO PRODUCE THIS DOCUMENT TO ANYONE
14 ELSE, YOU HAVE TO GO BACK TO THAT THIRD PARTY AND
15 GET THEIR CONSENT FOR THE PRODUCTION, OR AT LEAST
16 GIVE THEM AN OPPORTUNITY TO FILE SOME KIND OF
17 MOTION FOR PROTECTIVE ORDER TO STOP THE PRODUCTION.

18 THAT'S WHAT I'M TALKING ABOUT.

19 MR. SAVERI: MAYBE I WASN'T CLEAR.

20 THE COURT: I'M NOT TALKING ABOUT A
21 PROTECTIVE ORDER IN THIS CASE.

22 MR. SAVERI: OKAY. MAYBE I WASN'T CLEAR.

23 WHATEVER -- TO THE EXTENT THERE ARE
24 AGREEMENTS THAT GOVERN THOSE DOCUMENTS, THEY
25 SHOULD, OF COURSE, DO WHAT THEY NEED -- THAT ARE IN

1 FORCE, THEY SHOULD DO WHAT THEY NEED TO PROTECT THE
2 RIGHTS OR INTERESTS OF THOSE THIRD PARTIES.

3 FRANKLY, I HAVEN'T HEARD THAT THAT'S
4 ANYTHING BUT A HYPOTHETICAL CONCERN.

5 BUT IF THERE ARE, OF COURSE THEY SHOULD
6 PROTECT THEM.

7 AND ONCE -- AND I JUST WANT TO ASSURE THE
8 COURT THAT WE'RE NOT GOING TO -- WE'LL PROTECT
9 THOSE DOCUMENTS ONCE WE GET THEM, EVEN ABSENT A
10 PROTECTIVE ORDER.

11 SO THAT SHOULD NOT BE AN IMPEDIMENT TO
12 MOVING THIS THING FORWARD.

13 MR. RUBIN: YOUR HONOR, CAN I JUST MAKE
14 ONE SUGGESTION?

15 MR. SAVERI: EXCUSE ME.

16 MR. RUBIN: ONE SUGGESTION, IF I MAY?

17 MR. SAVERI: EXCUSE ME.

18 I THINK THAT IF -- YOU KNOW, THAT --
19 THOSE MATERIALS CAN AND SHOULD BE TURNED OVER
20 WITHOUT A LOT OF ADDITIONAL BURDEN AND WE SHOULD
21 ADDRESS THAT AND SET A SCHEDULE FOR DOING THAT
22 TODAY.

23 MR. RUBIN: OKAY. YOUR HONOR, I -- I
24 THINK -- I THINK WE'VE GONE FROM THE ISSUE OF
25 WHETHER THERE SHOULD BE A TEMPORARY STAY TO,

1 FRANKLY, STRIPPING THE DEFENDANTS OF THEIR RIGHTS
2 TO OBJECT IN THE NORMAL COURSE TO A DOCUMENT
3 REQUEST.

4 SO I HEAR WHAT THE COURT IS SAYING. IT
5 WANTS DISCOVERY. IT DOESN'T WANT TO WAIT FOR
6 DISCOVERY TO START UNTIL ITS RULING.

7 I ALSO HEAR WHAT IT'S SAYING, THAT THIS
8 D.O.J. GROUP OF DOCUMENTS SEEMS LIKE SOMETHING THAT
9 WOULD BE RELATIVELY EASY TO BEGIN WITH.

10 BUT PLAINTIFFS FILED A DOCUMENT REQUEST.
11 IN THE NORMAL COURSE WE WOULD RESPOND TO THAT
12 DOCUMENT REQUEST AND WE'D SAY, "WE'RE PREPARED TO
13 PRODUCE THESE DOCUMENTS. AS TO OTHER DOCUMENTS,
14 IT'S OVERBROAD. THERE ARE PROBLEMS."

15 I BELIEVE, AT A MINIMUM, WE SHOULD HAVE
16 THE RIGHT TO SAY, EVEN AS TO DOCUMENTS WITHIN THE
17 D.O.J. PRODUCTION, "WE THINK THAT THESE ARE NOT
18 RELEVANT. WE THINK THAT THESE ARE NOT GERMANE TO
19 THIS CASE. WE DON'T BELIEVE THAT YOU'RE ENTITLED
20 TO THESE UNDER THE RULES."

21 NOW, ULTIMATELY YOU OR JUDGE LLOYD MAY
22 SAY, "NO, NO. EVEN THOUGH THEY'RE NOT RAISED
23 SPECIFICALLY IN THE COMPLAINT, THEY MAY BE
24 RELEVANT."

25 WE WOULD HAVE OUR ARGUMENTS BACK.

1 BUT I DON'T SEE HOW, TODAY, WE WOULD BE
2 STRIPPED OF THE ABILITY TO RAISE OBJECTIONS TO A
3 SUBCATEGORY.

4 THE COURT: YOU HAVE REFUSED TO FILE
5 OBJECTIONS TO THE DOCUMENT REQUESTS --

6 MR. RUBIN: NOT AT ALL.

7 THE COURT: -- THUS FAR.

8 MR. RUBIN: NO, NO.

9 THE COURT: WEREN'T THOSE SERVED IN THE
10 FIRST CASE AND THEY HAVE NEVER BEEN FILED?

11 MR. RUBIN: NO, YOUR HONOR.

12 JUST TO CLARIFY THAT, THAT'S ABSOLUTELY
13 NOT TRUE. THEY WERE SERVED AND WE HAD AN AGREEMENT
14 WITH PLAINTIFFS, BECAUSE WE HAD IMMEDIATELY SOUGHT
15 TO REMOVE, THAT THOSE WOULD BE PUT IN ABEYANCE
16 UNTIL THE QUESTION OF WHERE THIS CASE WAS GOING TO
17 BE HEARD.

18 SO THERE'S NEVER BEEN ANY OVERDUE,
19 THERE'S NEVER BEEN ANY MISSED DEADLINE IN THIS
20 CASE.

21 AND WE SPECIFICALLY REPRESENTED TO
22 PLAINTIFFS, AND WE'VE BEEN FAITHFUL TO THIS, THAT
23 WE WOULD MEET EVERY DISCOVERY DEADLINE UNLESS AND
24 UNTIL THE COURT ISSUES A STAY.

25 THEY FILED THEIR DOCUMENT REQUESTS IN

1 THIS CASE ON OCTOBER 3RD, THE DAY THAT WE HAD OUR
2 RULE 26 CONFERENCES, CONFERENCE. THOSE ARE DUE ON
3 NOVEMBER 7TH.

4 SO WE INTEND, ABSENT A STAY, TO RESPOND
5 TO THOSE DOCUMENT REQUESTS.

6 AND WITH THE COURT -- IF THE COURT SAYS
7 "I'M GOING TO LIMIT DISCOVERY TO WHAT'S WITHIN THE
8 CONFINES OF THE D.O.J. PRODUCTION," WE UNDERSTAND
9 THAT.

10 BUT WE SHOULD STILL GET AN OPPORTUNITY,
11 EVEN AS TO THAT UNIVERSE OF DOCUMENTS, TO RAISE
12 OBJECTIONS AS TO PARTICULAR CATEGORIES THAT MAY BE
13 WITHIN THE PRODUCTION, BUT STILL NOT DISCOVERABLE
14 IN THIS CASE.

15 WE HAVEN'T BRIEFED THAT. THERE HASN'T
16 BEEN ANY ADJUDICATION OF THAT.

17 SO WE'RE -- WE ARE FULLY TIMELY. WE
18 FILED OUR INITIAL DISCLOSURES. WE'VE MET WITH THEM
19 ON ELECTRONIC DISCOVERY.

20 WE ARE -- WE DO NOT -- I DON'T THINK IT
21 WOULD BE FAIR TO DRAW ANY INFERENCE THAT WE HAVE
22 ESSENTIALLY DECIDED NOT TO PARTICIPATE IN THE
23 DISCOVERY PROCESS. WE HAVE.

24 AND, IN FACT, THAT'S WHY WE FILED THE
25 STAY ON THE SAME DAY AS THE MOTION TO DISMISS.

1 WE'RE JUST SAYING WE WANT THE RIGHTS THAT
2 ARE OTHERWISE ACCORDED TO ANY DEFENDANT, THAT WE
3 GET A CHANCE TO RESPOND TO THE DISCOVERY REQUESTS;
4 IF THE COURT THINKS IT'S APPROPRIATE, WHICH WE
5 AGREE AT A MINIMUM THAT IT SHOULD BE LIMITED TO
6 THIS SUBSUBCATEGORY OF DOCUMENTS, BUT AT LEAST --
7 BUT EVEN WITHIN THAT CONTEXT, TO BE ABLE TO OBJECT
8 TO CERTAIN DOCUMENTS THAT ARE WITHIN THAT CATEGORY
9 BASED ON TIME LIMITATION, BASED ON NON-DEFENDANTS,
10 BASED ON OTHER CATEGORIES THAT WE THINK ARE OUTSIDE
11 THE SCOPE OF THE FOUR CORNERS OF THIS COMPLAINT,
12 THAT WE WOULD STILL HAVE AN OPPORTUNITY TO OBJECT.

13 AND IF THERE'S A DIFFERENCE, WE'LL RAISE
14 IT, IT'LL PROBABLY BE RAISED EVEN BEFORE
15 JANUARY 26TH, AND WE'LL RESOLVE IT.

16 BUT I CAN'T -- IT WOULD BE -- IT WOULD BE
17 UNUSUAL, IN MY VIEW, TO JUST STRIP US OF THAT, FOR
18 THE COURT TO RULE THAT ALL OF THOSE ARE JUST
19 PRESUMPTIVELY DISCOVERABLE BEFORE EVEN HEARING FROM
20 US.

21 MR. SAVERI: YOUR HONOR --

22 THE COURT: WHAT'S THAT?

23 MR. SAVERI: I DON'T KNOW IF YOU WANT TO
24 GO INTO HOW WE ENDED UP IN THE KIND OF DITCH HERE
25 ON CASE MANAGEMENT AND HOW THE DEFENDANTS HAVEN'T

1 RESPONDED AND PARTICIPATED --

2 THE COURT: NO, I REALLY DON'T WANT TO GO
3 THERE.

4 MR. SAVERI: OKAY. SO I'M JUST GOING TO
5 LEAVE THOSE REPRESENTATIONS ALONE, BUT I DON'T
6 THINK THEY'RE TRUE.

7 THE -- WE'VE IDENTIFIED THESE DOCUMENTS
8 AS A CORE SET OF DOCUMENTS AND AS A WAY OF KIND OF
9 STAGING THIS DISCOVERY AND TO START MOVING THIS
10 CASE ALONG SINCE THE EARLY SUMMER, AND WE THINK
11 THAT THE -- IT'S ENTIRELY APPROPRIATE TO START THE
12 DISCOVERY IN THIS CASE, YOU KNOW, SO MANY MONTHS
13 AFTER THE CASE WAS FILED, WITH THE DEPARTMENT OF
14 JUSTICE PRODUCTION.

15 I AM -- I'M A LITTLE BIT CONCERNED THAT
16 EVEN, EVEN NOW I'M HEARING THAT WE ARE GOING TO
17 HAVE AN EXTENSIVE KIND OF LAW AND MOTION PRACTICE
18 ABOUT EVEN THE RELEVANCY OF THE DEPARTMENT OF
19 JUSTICE MATERIALS.

20 I THINK THAT'S UNFORTUNATE, BUT THE --
21 THE ISSUE AT THIS POINT IS, CAN WE GET THIS CASE
22 STARTED? CAN WE START MOVING AND START DOING THE
23 WORK?

24 AND WITH THE DEPARTMENT OF JUSTICE
25 MATERIALS, I THINK WE HAVE A READY SET OF MATERIALS

1 THAT CAN BE PRODUCED WITHOUT A LOT OF TROUBLE.

2 IF THEY WANT TO WAIT UNTIL NOVEMBER 7TH,
3 OR WHATEVER THE DUE DATE IS UNDER THE PRODUCTION,
4 WHATEVER THE RULE IS, 30 DAYS AFTER WE ORIGINALLY
5 PROPOUNDED THEM, THAT'S FINE.

6 BUT WE NEED TO GET THIS THING GOING, AND
7 THE CASE HAS ALREADY BEEN LANGUISHING TOO LONG.

8 MR. RUBIN: YOUR HONOR, ALL I'M SAYING IS
9 THAT A PRIOR PRODUCTION DOESN'T WAIVE OUR RIGHTS
10 UNDER THE RULES, HOWEVER MUCH HAS BEEN AGGREGATED
11 ALREADY.

12 THE COURT: WHAT -- MR. SAVERI, I HAVEN'T
13 HEARD YOU -- I HAVE TO SAY I'M GETTING PERSUADED BY
14 THE DEFENDANTS AS TO LIMITING IT FROM 2004 TO 2009.

15 IS THERE ANYTHING YOU WANT TO SAY ABOUT
16 THAT?

17 MR. SAVERI: WELL, YOUR HONOR, THE --
18 WELL, YOUR HONOR, THE PRODUCTION OF -- WELL, WE'VE
19 ALLEGED -- OUR ORIGINAL DOCUMENT REQUEST IS MORE
20 BROAD THAN THE CLASS PERIOD, AND WE'RE -- AND WE'RE
21 ENTITLED TO GO BACK, UNDER REGULAR DISCOVERY RULES,
22 AND WE'RE NOT LIMITED IN DISCOVERY BY OUR INITIAL
23 CLASS PERIOD ALLEGED IN THE COMPLAINT.

24 I MEAN, THERE'S SETTLED LAW TO THAT
25 EFFECT.

1 NOW, THE -- THE IDEA THAT THE DEFENDANTS
2 WOULD TAKE THE TIME NECESSARY TO GO BACK AND KIND
3 OF PULL OUT MATERIAL BEFORE THE CLASS PERIOD
4 REALLY, TO ME, IS A MULTIPLICATION OF THE
5 PROCEEDINGS AND HIGHLY INEFFICIENT.

6 THAT SET IS -- CAN BE PRODUCED.

7 AND AS WE'VE SAID TO THE DEFENDANTS, YOU
8 KNOW, THERE ARE WAYS -- IF THERE'S -- IF THEY ARE
9 CONCERNED ABOUT PRODUCING IRRELEVANT MATERIAL,
10 THERE ARE WAYS OF PROTECTING THAT.

11 BUT FOR NOW, YOUR HONOR, WE HAVE AN
12 ENTITLEMENT TO DISCOVERY. THERE IS NO STAY.

13 WE'VE ACTUALLY STRUGGLED TO FIND THE
14 LEAST BURDENSOME WAY OF GETTING THIS THING GOING
15 WITHOUT FORCING THE DEFENDANTS TO SPEND A LOT OF
16 TIME AND MONEY REVIEWING THE DOCUMENTS.

17 SO WE THINK THEY SHOULD PRODUCE IN THAT
18 FASHION RIGHT AWAY.

19 AND I DO THINK YOUR INSTINCT IS CORRECT,
20 YOUR HONOR, THAT -- THIS IS THE FIRST TIME I CAN
21 REMEMBER WHERE I'VE HAD SUCH A BIG FIGHT ABOUT THIS
22 CORPUS OF DOCUMENTS, AND THERE MUST BE SOMETHING
23 INTERESTING IN THERE THAT HAS A LOT TO DO WITH THIS
24 CASE.

25 MR. RUBIN: YOUR HONOR, WE REALLY,

1 BELIEVE IT OR NOT, ARE ARGUING ON PRINCIPLE. WE
2 JUST DON'T THINK WE SHOULD HAVE TO RESPOND TO
3 DOCUMENTS UNTIL THERE'S A COMPLAINT THAT'S BEEN
4 VALIDATED.

5 BUT I KNOW PRINCIPLE HAS GONE OUT THE
6 WINDOW A LONG TIME AGO.

7 MR. SAVERI: BUT OF COURSE, YOUR HONOR,
8 THAT PRINCIPLE THAT MY COLLEAGUE JUST STATED IS
9 FOUND NOWHERE IN THE FEDERAL RULES. IT'S
10 INCONSISTENT WITH RULE 8 AND RULE 12. IT'S
11 INCONSISTENT WITH RULE 26. IT'S, FRANKLY,
12 INCONSISTENT WITH TWOMBLY.

13 SO THAT MIGHT BE A PRINCIPLE THAT THE
14 DEFENDANTS WOULD LIKE THE COURT TO ADOPT HERE, BUT
15 THAT'S NOT A -- THAT'S THE LAW.

16 MR. RUBIN: YOUR HONOR, I THINK WE WOULD
17 BE PREPARED TO AGREE -- BASED UPON YOUR COMMENTS
18 AND WHERE THINGS ARE AND KNOWING THAT YOU PROBABLY
19 DON'T WANT TO SPEND ALL DAY LISTENING TO THE TWO OF
20 US, WE WOULD BE PREPARED TO PRODUCE DOCUMENTS BACK
21 TO 2004.

22 I DO -- I WOULD LIKE TO FIND A MECHANISM,
23 AS AFFORDED UNDER THE RULES, TO BE ABLE TO OBJECT
24 TO SOME DISCRETE SUBCATEGORIES OF DOCUMENTS THAT WE
25 GENUINELY DON'T BELIEVE ARE RELEVANT, AT LEAST AT

1 THIS POINT, TO THIS CASE.

2 AND I WOULD NOT -- I WOULD HATE TO JUST
3 HAVE THOSE RELINQUISHED, THOSE RIGHTS RELINQUISHED.

4 SO -- BUT WE SORT OF RECOGNIZE THAT --
5 WHERE THE COURT IS.

6 THE COURT: I GUESS I DON'T UNDERSTAND
7 WHY YOU WOULD PRODUCE DOCUMENTS THAT AREN'T
8 RELEVANT IN THIS CASE TO THE D.O.J.

9 MR. RUBIN: YOU MEAN YOU DON'T UNDERSTAND
10 HOW SOMETHING COULD BE -- LET'S TAKE AN EXAMPLE.

11 THE COURT: YOU'RE THE ONE THAT SAID THAT
12 THEIR WHOLE -- THAT THE PLAINTIFFS' COMPLAINT IS
13 EXACTLY CRIBBED FROM THE D.O.J. COMPLAINT.

14 MR. RUBIN: RIGHT. SO I'LL GIVE YOU A
15 CONCRETE EXAMPLE RELATING TO A NON-DEFENDANT.

16 SO IF THERE WAS A BUSINESS PARTNERSHIP,
17 SOME KIND OF A COLLABORATION THAT HAD SOME KIND OF
18 VERY LIMITED AGREEMENT, UNDERSTANDING, OR EXCHANGE
19 ABOUT NOT RECRUITING FROM THE TEN PEOPLE WHO ARE IN
20 A JOINT VENTURE, D.O.J. MAY HAVE LOOKED AT THAT AND
21 SAID, "WELL, THIS IS NOT WHAT WE'RE CONCERNED
22 ABOUT."

23 THAT ARRANGEMENT, THAT BUSINESS
24 ARRANGEMENT, ONE, MAY BE CONFIDENTIAL; AND, TWO,
25 REALLY IS NOT AT ALL RELEVANT TO THIS CASE IN OUR

1 VIEW.

2 NOW, PLAINTIFFS COULD DIFFER --

3 THE COURT: SO YOU'RE SAYING THERE ARE
4 MORE POTENTIAL DEFENDANTS OUT THERE?

5 MR. RUBIN: NO. I'M ACTUALLY SAYING --

6 THE COURT: THAT'S WHAT IT SOUNDS LIKE,
7 RIGHT? YOU'RE SAYING, "WE HAVE THESE OTHER NO COLD
8 CALLING AGREEMENTS WITH OTHER COMPANIES THAT AREN'T
9 IDENTIFIED IN HERE."

10 MR. RUBIN: NOT AT ALL. I'M SAYING
11 EXACTLY THE OPPOSITE.

12 I'M SAYING THERE COULD BE ARRANGEMENTS,
13 VERY LIMITED JOINT VENTURE ARRANGEMENTS.

14 IF YOU LOOK AT THE CONSENT DECREE, THE
15 CONSENT DECREE SAID, "IN OUR VIEW, THESE ARE PER SE
16 VIOLATIONS."

17 BUT THERE ARE LOTS OF OTHER ARRANGEMENTS
18 THAT WOULD -- THAT ARE LESS BROAD THAT COULD WELL
19 BE LEGAL AND PERMISSIBLE.

20 AND I CAN TELL YOU, SITTING HERE TODAY,
21 THERE WERE MORE AGREEMENTS REVIEWED THAN WHAT WERE
22 ULTIMATELY PART OF THE COMPLAINT.

23 THAT IS, THERE WERE -- THERE WERE --

24 THE COURT: MORE AGREEMENTS BETWEEN THE
25 PARTIES THAT ARE DEFENDANTS IN THIS CASE?

1 MR. RUBIN: NO, NO. THERE WERE OTHER
2 KINDS OF ARRANGEMENTS THAT WERE CONSIDERED BY THE
3 DEPARTMENT OF JUSTICE, BUT NEVER ACTED ON.

4 IN OTHER WORDS, THEY WERE NOT A SUBJECT
5 OF THE ENFORCEMENT ACTION.

6 SO COMPANY A AND NON-DEFENDANT MAY HAVE
7 HAD A VERY LIMITED BUSINESS ARRANGEMENT.

8 LET'S SAY THAT WE HAD A JOINT VENTURE TO
9 MAKE SOMETHING AND THERE WAS AN AGREEMENT.

10 IT WOULD HAVE BEEN CAPTURED BY THE D.O.J.
11 REQUEST THAT, BECAUSE THERE WAS SOME KIND OF
12 AGREEMENT, DON'T RECRUIT FROM THIS GROUP OF TEN
13 PEOPLE WHO WERE INVOLVED IN THIS NEW PROJECT.

14 D.O.J. MAY HAVE GOTTEN THAT AND SAID,
15 "WELL, THAT'S NOT OUR -- WE'RE NOT CONCERNED ABOUT
16 THAT KIND OF AGREEMENT. IT'S THE KIND OF AGREEMENT
17 WE DON'T THINK IS A PROBLEM."

18 THE COURT: WHY? JUST BECAUSE OF THE
19 NUMBER OF EMPLOYEES INVOLVED?

20 MR. RUBIN: YEAH, BECAUSE OF ALL THE
21 FEATURES, THE PRINCIPLES.

22 IF YOU LOOK AT THE D.O.J.'S ANALYSIS,
23 THEY HAD A PARTICULAR VIEW ABOUT WHAT WAS AND WHAT
24 WASN'T A PROBLEM.

25 SO THERE WERE A NUMBER OF BUSINESS

1 ARRANGEMENTS THAT JUST WEREN'T A PROBLEM FROM THEIR
2 VANTAGE POINT.

3 SO WE DON'T SEE WHY WE WOULD HAVE TO
4 PRODUCE ANY OF THOSE.

5 THE COURT: BUT THIS IS SAYING PROHIBITED
6 CONDUCT IN THE FINAL JUDGMENT THOUGH.

7 MR. RUBIN: THEY'RE DIFFERENT. I MEAN,
8 IN OTHER WORDS, THERE'S A SPECTRUM OF CONDUCT, AND
9 ALL WE'RE SAYING IS WHY WOULD WE NECESSARILY --
10 MAYBE WE'LL END UP -- YOU KNOW, MAYBE THE COURT
11 WOULD END UP SAYING MUCH OF THAT IS RELEVANT, BUT
12 MAYBE IT WOULDN'T.

13 SO TO JUST SAY TODAY "EVERYTHING THAT YOU
14 PRODUCED TO D.O.J. IS RELEVANT" IS JUST PREMATURE
15 IN OUR VIEW. THAT'S WHAT WE'RE SAYING.

16 I CAN TELL YOU, THERE IS A SPECTRUM OF
17 CONDUCT. NOT ALL OF THE CONDUCT WAS ALONG THE
18 LINES OF THE AGREEMENTS THAT ARE AT ISSUE HERE,
19 WHICH BY THE WAY WE DON'T THINK EVEN BILATERALLY
20 WERE NECESSARILY IMPROPER, BUT D.O.J. THOUGHT
21 OTHERWISE.

22 BUT WHAT WE'RE SAYING IS THERE ARE OTHER
23 KINDS OF ARRANGEMENTS --

24 THE COURT: I DON'T KNOW. I'M NOT
25 CONVINCED BY THAT.

1 YOU'RE SAYING "WE HAD OTHER NO COLD CALL
2 ARRANGEMENTS WITH THIRD PARTIES, BUT D.O.J., IN
3 PROSECUTORIAL DISCRETION, DECIDED NOT TO PROSECUTE
4 US ESSENTIALLY FOR THOSE."

5 MR. RUBIN: WELL, AND THEY MAY BE
6 PERFECTLY LEGAL IS WHAT I'M SAYING.

7 THEY -- IN FACT, IT'S NOT JUST --

8 THE COURT: WELL, BUT YOU'RE SAYING IT'S
9 THE EXACT SAME CONDUCT THAT THEY DID FIND TO BE
10 PROBLEMATIC IF IT'S AMONGST YOUR COMPANIES.

11 MR. RUBIN: IT COULD BE DIFFERENT KIND OF
12 CONDUCT. IT COULD BE SOME OTHER ARRANGEMENT.

13 THE COURT: I'M REALLY HOPING THAT YOU
14 ARE NOT GOING TO FILE -- THAT I'M NOT GOING TO SEE
15 MOTIONS TO COMPEL ON THAT BECAUSE I THINK THAT'S
16 RELEVANT AND THAT SHOULD BE PRODUCED.

17 MR. RUBIN: WELL, OKAY. YOUR HONOR, I
18 UNDERSTAND YOUR PRELIMINARY DECISION.

19 THE COURT: I'M NOT SAYING --

20 MR. RUBIN: I JUST WANT THE RIGHT TO --
21 WE JUST WANT THE RIGHT TO FILE THOSE OBJECTIONS.
22 THAT'S ALL I'M SAYING.

23 MAYBE AT THE END OF THE DAY, ALMOST ALL
24 OF THIS GOES OVER.

25 WE JUST WANT -- WHEN WE RESPOND TO THIS

1 DISCOVERY REQUEST, WE WANT TO BE ABLE TO SAY, IN
2 THOSE CATEGORIES WHERE WE GENUINELY THINK WE HAVE A
3 BASIS, "HEY, THAT CATEGORY OF DOCUMENTS IS NOT
4 RELEVANT."

5 THE COURT: OKAY. THE LAST EXAMPLE YOU
6 GAVE ME, I WOULD GRANT A MOTION TO COMPEL ON THAT.

7 IF THAT'S THE BEST CASE SCENARIO, THAT,
8 "YES, WE WERE COLLUDING NOT TO COLD CALL WITH THIRD
9 PARTIES, BUT D.O.J. DECIDED NOT TO PROSECUTE US FOR
10 THAT BECAUSE THE NUMBER OF EMPLOYEES WAS TOO SMALL
11 IN NUMBER" --

12 MR. RUBIN: WELL, THAT'S NOT --

13 THE COURT: WOW. I REALLY DON'T WANT TO
14 SEE DISCOVERY DISPUTES ON STUFF LIKE THAT, PLEASE.

15 MR. RUBIN: OKAY. I UNDERSTAND.

16 THE COURT: AND I AM DISTURBED BY WHAT
17 I'M HEARING OF YOUR SAYING, "OH, YOU HAVEN'T SEEN
18 ALL THE DISCOVERY MOTIONS THAT WE'RE GOING TO FILE
19 ON THE D.O.J. DOCUMENTS," I DON'T WANT TO HEAR
20 THAT.

21 MR. RUBIN: I THINK YOU'VE MISUNDERSTOOD
22 ME.

23 THE COURT: IF THAT'S YOUR ATTITUDE ABOUT
24 HOW TO STRUCTURE YOUR DOCUMENT PRODUCTION ON THE
25 D.O.J. DOCUMENTS, THEN THAT'S REALLY NOT BODING

1 WELL FOR HOW THIS IS GOING TO GO FORWARD.

2 MR. RUBIN: NO, NO. YOUR HONOR, I THINK
3 YOU MISUNDERSTOOD WHAT I'M SAYING.

4 THE COURT: AND IT WILL MAKE ME START
5 DOING VERY DRACONIAN DISCOVERY ORDERS.

6 I REACT BADLY WHEN I SEE A BUNCH OF
7 FRIVOLOUS, OBSTRUCTIONIST OBJECTIONS AND REQUIRING
8 REALLY UNNECESSARY MOTIONS TO COMPEL.

9 SO PLEASE DON'T GO THAT WAY.

10 MR. RUBIN: LET ME JUST TRY TO CORRECT --

11 THE COURT: DON'T GO THAT WAY.

12 MR. RUBIN: OKAY. I THINK I WAS
13 MISUNDERSTOOD IN THIS RESPECT.

14 THE COURT: OKAY.

15 MR. RUBIN: I'M TALKING ABOUT, AS A
16 THEORETICAL MATTER, IF THERE ARE NARROW
17 CATEGORIES -- I UNDERSTAND YOU'RE NOT PERSUADED BY
18 THE CATEGORY THAT I --

19 THE COURT: NOT THAT ONE.

20 MR. RUBIN: I THINK YOU WERE MORE
21 PERSUADED BY THE TIMING.

22 THE COURT: THE TIMING, OKAY.

23 MR. RUBIN: AND ALL I'M SAYING IS TODAY,
24 BEFORE WE HAVE AN OPPORTUNITY -- I HEAR EXACTLY
25 WHAT YOU'RE SAYING. I UNDERSTAND IT.

1 WE WOULD BE VERY CAREFUL IN RAISING ONLY
2 THOSE ISSUES THAT WE GENUINELY BELIEVE THERE'S AN
3 ISSUE ON.

4 ALL I'M SAYING IS TODAY, I DON'T THINK IT
5 WOULD BE APPROPRIATE TO SAY, "WE FOREVER, AS WE
6 WALK OUT OF THE COURTHOUSE TODAY, WAIVE OUR RIGHTS
7 TO ASSERT ANY OBJECTIONS TO ANY PORTION OF THE
8 D.O.J. PRODUCTION."

9 THE COURT: RIGHT.

10 MR. RUBIN: THAT'S ALL I'M SAYING.

11 THE COURT: I WOULD NOT ORDER THAT.

12 MR. RUBIN: OKAY. THAT'S ALL I'M SAYING,
13 YOUR HONOR.

14 THE COURT: BUT I ALSO DON'T WANT TO SEE
15 A LOT OF FRIVOLOUS OBJECTIONS AND A LOT OF HIDING
16 THE BALL WITH DISCOVERY, AND IF I SEE A LOT OF
17 THAT, I WILL ISSUE SANCTIONS BECAUSE --

18 MR. RUBIN: I UNDERSTAND.

19 THE COURT: -- YOU KNOW --

20 MR. RUBIN: I DO THINK WE'VE SORT OF PUT
21 THE CART BEFORE THE HORSE, AND I THINK AS THIS CASE
22 PROCEEDS, IF THIS CASE PROCEEDS -- AND WE DON'T
23 OBVIOUSLY THINK IT HAS A BASIS TO --

24 THE COURT: YEAH.

25 MR. RUBIN: -- YOU WILL SEE THAT THERE

1 ARE LOTS OF AGREEMENTS, NOT JUST IN THIS CASE, BUT
2 WE WILL BE BRINGING TO YOUR ATTENTION OTHER CASES,
3 THAT CERTAIN KINDS OF LIMITATIONS ON RECRUITING AND
4 JOINT VENTURE AND COLLABORATIVE CONTEXT HAVE
5 ACTUALLY BEEN RULED BY THE ANTITRUST AUTHORITIES TO
6 BE PRO COMPETITIVE; THAT IS, THAT TREATISES AND
7 CASE LAW SAYS IN CERTAIN CIRCUMSTANCES, AGREEMENTS
8 NOT TO NECESSARILY RECRUIT PEOPLE WHO ARE WORKING
9 TOGETHER ON A NEW VENTURE, ON A BUSINESS
10 COLLABORATION, HAVE ACTUALLY NOT JUST BEEN SAID,
11 "OH, WE JUST CHOSE NOT TO PROSECUTE," BUT COURTS
12 HAVE SAID THOSE ARE PRO COMPETITIVE, ANCILLARY
13 AGREEMENTS.

14 THE COURT: WHAT'S THE OBJECTION? WHAT'S
15 THE OBJECTION?

16 NOTHING HERE SAYS THAT YOU HAVE TO
17 PRODUCE THE REGULATORY DOCUMENTS ONLY IF IT'S BEEN
18 DEEMED ANTICOMPETITIVE.

19 WHAT'S THE OBJECTION?

20 MR. RUBIN: I WOULD POINT TO THINGS --

21 THE COURT: WHAT'S THE OBJECTION? IS IT
22 GOING TO BE BURDENSOME? IS IT GOING TO BE -- WHAT?

23 MR. RUBIN: IT'S JUST MATERIAL THAT'S
24 OUTSIDE THE COMPLAINT. THAT'S MY ONLY POINT.

25 IT DOESN'T HARM US IN THAT CONTEXT, BUT

1 IT'S JUST MATERIAL OUTSIDE THE COMPLAINT AND WE
2 SHOULD HAVE AN OPPORTUNITY TO KEEP IT TO THE
3 CONFINES OF THE COMPLAINT.

4 I DON'T HAVE AN OBJECTION IN THE SENSE
5 OF, "OH, IT'LL BE DEVASTATING TO US. IT'S SO
6 HARMFUL."

7 LOTS OF ARRANGEMENTS LIKE THIS ARE PRO
8 COMPETITIVE.

9 THE COURT: I MEAN, THE STANDARD FOR
10 WHAT'S RELEVANT AND WHAT SHOULD BE PRODUCED IS
11 PRETTY LOW. I GUESS I'M -- I'M GETTING MORE
12 CONCERNED.

13 I THINK I'M GOING TO GO BACK TO 2000,
14 BECAUSE I'M GETTING MORE AND MORE CONCERNED WHEN
15 I'M HEARING ABOUT WHAT YOU'RE GOING TO WITHHOLD.

16 UNDER THE STANDARD FOR WHAT SHOULD BE
17 PRODUCED, IT'S A PRETTY --

18 MR. RUBIN: I'M NOT SAYING I'M
19 WITHHOLDING --

20 THE COURT: -- LOW STANDARD, AND YOU'RE
21 SAYING, "NO, NO, NO. ONLY IF IT'S DIRECTLY
22 RELEVANT TO THE COMPLAINT AS IT CURRENTLY STANDS,"
23 AND I THINK THAT'S NOT THE STANDARD.

24 MR. RUBIN: I UNDERSTAND, YOUR HONOR.

25 THE COURT: SO --

1 MR. RUBIN: AND YOU'VE ESSENTIALLY
2 ALREADY GIVEN A RULING ON IF THERE WERE AGREEMENTS
3 THAT WERE, EVEN FROM OUR PERSPECTIVE, PRO
4 COMPETITIVE, BUT HAVE THE SAME KIND OF CONDUCT.

5 I AM SIMPLY TRYING TO PRESERVE A RIGHT
6 WHICH MAY NOT BE EXERCISED.

7 AND I THINK YOUR HONOR SAID YOU WOULDN'T
8 ORDER THAT. YOU WOULD NOT -- YOU WOULD NOT REMOVE
9 FROM US THE RIGHT TO, TO MAKE AN OBJECTION TO SOME
10 PORTION OF THE D.O.J. PRODUCTION.

11 AND WITH THAT, I UNDERSTAND WHAT YOU'RE
12 SAYING, THAT THE D.O.J. PRODUCTION IS PRESUMPTIVELY
13 RELEVANT, I THINK THAT IS WHAT THE COURT IS SAYING,
14 AND YOU WOULD HEAR FROM US, BUT YOU'RE TELLING US
15 DON'T PUSH IT AND DON'T, YOU KNOW, RAISE THINGS
16 THAT ARE NOT -- THAT DON'T HAVE ANY BASIS.

17 I DO THINK THE TIME LIMITATION IS, YOU
18 KNOW -- THE 2004 -- GOING BACK A YEAR IS A VERY
19 STANDARD TIME LIMITATION FOR AN ANTITRUST
20 COMPLAINT, TO GO BACK A YEAR BEFORE THE COMPLAINT,
21 BUT NO MORE.

22 MR. SAVERI: YOUR HONOR --

23 MR. RUBIN: SO --

24 THE COURT: YEAH. I NEED TO START
25 BRINGING THIS TO A CLOSE, BUT GO AHEAD.

1 MR. SAVERI: YOUR HONOR, LET ME JUST SAY
2 SOMETHING ABOUT THE TIMING AND THEN MAYBE I SHOULD
3 BE QUIET.

4 YOU KNOW, WE DO NOT -- ONE OF THE REASONS
5 WE LOOK BACK BEFORE WE THINK WE WERE AWARE THAT THE
6 FIRST AGREEMENT HAPPENED IS THAT THIS IS A
7 CONSPIRACY CASE.

8 ISSUES LIKE MOTIVE ARE VERY IMPORTANT.
9 WE -- THERE ARE -- ANY COMMUNICATIONS -- WE DO NOT
10 THINK THAT THE AGREEMENTS JUST HAPPENED ONE DAY,
11 THAT PEOPLE CAME TO WORK AND THERE WAS AN AGREEMENT
12 THAT -- IT ONLY MAKES SENSE, YOUR HONOR, IF THERE
13 WERE COMMUNICATIONS AND PLANNING AND CONSIDERATION
14 AND PERHAPS INVITATIONS TO ENTER INTO THESE KIND OF
15 AGREEMENTS.

16 AND AS WE CITED IN THE COMPLAINT, SOME
17 PEOPLE TOLD OTHER PEOPLE WHO PARTICIPATED IN THESE
18 AGREEMENTS, "YOU'RE NUTS. THIS IS ILLEGAL. YOU'RE
19 GOING TO GO -- YOU WILL PROBABLY GO TO JAIL."

20 THIS IS THE -- SO THERE'S A GOOD FAITH
21 REASON, AND A LEGITIMATE REASON, CONSISTENT WITH
22 THE PERMISSIBLE SCOPE OF DISCOVERY, TO GO BACK
23 BEFORE WHEN WE THINK THE FIRST AGREEMENT HAPPENED
24 BECAUSE THERE IS EVIDENCE THAT'S GOING TO BE FOUND
25 FOR THAT PRIOR PERIOD WHICH IS DIRECTLY RELEVANT TO

1 PROIVING THE AGREEMENTS, PROVING THEIR PURPOSE, AND
2 PROVING THE EFFECT.

3 AND WE -- I HAVE BEEN IN A NUMBER OF
4 CASES WHERE THERE HAVE BEEN PREEXISTING
5 DEPARTMENT -- GOVERNMENTAL ACTIVITY, LIKE THE LCD
6 CASE WHERE WE GOT -- WE RECEIVED MATERIALS PRIOR --
7 ONE YEAR PRIOR TO THE FIRST DATE OF THE FIRST
8 GOVERNMENT SUBPOENA.

9 SO WE HAVEN'T HAD AN OPPORTUNITY TO BRIEF
10 THIS, YOUR HONOR, BUT WE CAN CERTAINLY SHOW YOU THE
11 AUTHORITY THAT, IN CLASS ACTIONS, AND IN PARTICULAR
12 ANTITRUST CLASS ACTIONS, THE COURTS, WHEN THEY HAVE
13 CONSIDERED THIS, REALIZE AND UNDERSTAND THAT THE
14 DISCOVERY PERIOD PREDATES, OR SHOULD PREDATE THE
15 FIRST AGREEMENT ALLEGED IN THE COMPLAINT. SO
16 THAT'S WHAT I WOULD SAY ABOUT THE TIMING.

17 AND THEN I WOULD ALSO SAY THAT THE IDEA
18 THAT THEY WOULD HAVE TO GO THROUGH THE CORPUS OF
19 DOCUMENTS AND PULL THESE THINGS OUT WHEN THERE IS
20 ARGUABLE RELEVANCE TO OUR CORE ALLEGATIONS SEEMS TO
21 ME A WASTE OF TIME.

22 THE COURT: ALL RIGHT. WELL, THIS IS
23 WHAT I'M GOING TO DO: I THINK DOCUMENT REQUESTS 1
24 THROUGH 7 CAN GO FORWARD, BUT I'M GOING TO GIVE THE
25 DEFENDANTS -- SINCE THERE WAS ALL THIS CONFUSION

1 ABOUT WHO WAS SUPPOSED TO DECIDE THIS, WAS THIS
2 GOING TO BE HEARD ON DECEMBER 8TH OR NOT, I'M GOING
3 TO GIVE YOU 30 DAYS FROM TODAY, WHICH I THINK WOULD
4 THEN BUMP IT OUT TO -- UNFORTUNATELY, THAT'S, LIKE,
5 THANKSGIVING, NOVEMBER 28TH.

6 DO YOU WANT TO BUMP IT OUT TO
7 NOVEMBER 30TH?

8 MR. SAVERI: YOUR HONOR, I DON'T WANT --
9 IF WE WANT TO PUSH IT, WE DON'T PLAN ON LOOKING AT
10 THE DOCUMENTS OVER THANKSGIVING, SO IF THE
11 DEFENDANTS WANT TO TAKE UNTIL THE FOLLOWING WEEK,
12 THAT'S FINE.

13 MR. RUBIN: SO, YOUR HONOR, RESPONSE IS
14 DUE BY NOVEMBER 30TH?

15 THE COURT: BY NOVEMBER 30TH, THAT'S
16 RIGHT.

17 BUT YOU SHOULD INCLUDE -- WHILE YOU'RE
18 GOING TO PRESERVE ALL YOUR OBJECTIONS, I REALLY
19 DON'T WANT ANY GAME PLAYING.

20 I THINK THERE SHOULD BE A PRODUCTION THAT
21 ACCOMPANIES THOSE OBJECTIONS, AND WHAT YOU WITHHOLD
22 BETTER BE DARN WELL JUSTIFIED.

23 NOW, I'M NOT GOING TO DO ANY LIMITATION
24 TO 2004. IT'LL BE FROM 2000 TO 2009 BECAUSE I
25 THINK HOW ANY COLLUSIVE CONDUCT STARTED, WHAT THOSE

1 CONVERSATIONS WERE, WHO WAS INVOLVED, WHAT
2 GENERATED THOSE AGREEMENTS, I THINK THAT'S RELEVANT
3 TO THE COMPLAINT.

4 NOW, EVERYTHING ELSE IS GOING TO BE
5 STAYED. NO INTERROGATORIES, NO DEPOSITIONS.

6 ALL THE REST OF YOUR -- I DON'T SEE WHY
7 YOU NEED THESE, NUMBER 8, INDICES AND LISTS.

8 I JUST THINK THAT'S GOING TO INCLUDE A
9 LOT OF WORK PRODUCT AND I DON'T THINK THE
10 DEFENDANTS HAVE ANY OBLIGATION TO NICELY CATEGORIZE
11 THEIR DOCUMENT PRODUCTION FOR YOU ANYWAY.

12 A PRIVILEGE LOG, I THINK THAT'S OKAY.

13 MR. SAVERI: THAT'S WHAT I WAS GOING TO
14 ASK ABOUT.

15 I MEAN, I ASSUME THAT, WITH THE
16 DEPARTMENT OF JUSTICE, THAT THERE WERE PRIVILEGE
17 LOGS PRODUCED.

18 I MEAN, MAYBE THEY DID NOT WITHHOLD
19 ANYTHING, BUT TO THE EXTENT THAT THOSE ARE IN
20 EXISTENCE, THOSE SHOULD BE TURNED OVER AS WELL.

21 THE COURT: ALL RIGHT. SO IT'S JUST
22 GOING TO BE DOCUMENT REQUESTS 1 THROUGH 7.

23 EVERYTHING ELSE IS STAYED, STAYED UNTIL
24 THE HEARING ON JANUARY 26TH OF 2012.

25 IT'S GOING TO BE PRODUCED NOVEMBER 30TH.

1 YOU CAN, OF COURSE, FILE YOUR OBJECTIONS.

2 THERE MAY NEED TO BE SOME MEET AND CONFER
3 SUBSEQUENT TO THAT, BUT I REALLY DON'T WANT TO SEE
4 ANY HIDE THE BALL ON THIS.

5 AND YOU'LL ALSO PRODUCE A PRIVILEGE LOG.

6 DO YOU NEED MORE THAN NOVEMBER 30TH FOR
7 THE PRIVILEGE LOG?

8 MR. RUBIN: YES, YOUR HONOR, IF WE COULD.

9 THE COURT: ALL RIGHT.

10 MR. RUBIN: IF WE COULD HAVE -- I THINK
11 THE PRIVILEGE LOG OBVIOUSLY RELATES TO THE D.O.J.
12 PRODUCTION, SO JUST MAYBE ANOTHER WEEK OR TWO.

13 THE COURT: I CAN GIVE YOU MORE THAN THAT
14 IF YOU NEED IT.

15 MR. RUBIN: OKAY. WELL, I MEAN, SOME
16 TIME BEFORE THE NEW YEAR IS FINE.

17 MR. SAVERI: BUT, YOUR HONOR, I DON'T
18 UNDERSTAND NOW WHETHER THEY'RE GOING TO DO A NEW
19 PRIVILEGE LOG OR THEY'RE JUST GOING TO WAIT AND
20 PRODUCE IT. IT DOESN'T TAKE THAT LONG TO PRODUCE
21 THE OLD PRIVILEGE LOG.

22 MR. RUBIN: I ONLY SAY THAT BECAUSE, AT
23 LEAST IN MY EXPERIENCE WITH JUSTICE DEPARTMENT
24 PRODUCTIONS, I JUST DON'T KNOW FOR ALL DEFENDANTS
25 HOW COMPLETE THE PRIVILEGE LOG WAS WITH RESPECT TO

1 EVERY SINGLE DEFENDANT IN THEIR D.O.J. PRODUCTION.
2 I JUST DON'T KNOW THAT.

3 THE COURT: I'M NOT SAYING THAT THEY -- I
4 MEAN, THEY HAVE A RIGHT TO MAKE A NEW LOG.

5 MR. SAVERI: OKAY.

6 THE COURT: NOW --

7 MR. SAVERI: IT'S FINE, YOUR HONOR. IT
8 REALLY IS.

9 THE COURT: OKAY. BUT I DON'T WANT A LOT
10 OF GAME PLAYING. I DON'T WANT THEM WITHHOLDING A
11 LOT OF DOCUMENTS THAT REALLY SHOULD BE PRODUCED.

12 MR. SAVERI: OKAY. I'M NOT GOING TO PUSH
13 TOO HARD ON THAT.

14 THANK YOU, YOUR HONOR.

15 THE COURT: YEAH. AND I HOPE I'VE
16 CONVEYED THAT STRONGLY, THAT I REALLY DON'T WANT
17 ANY GAME PLAYING ON THE DISCOVERY, PLEASE.

18 MR. RUBIN: YOUR HONOR, YOU HAVE.

19 THE COURT: OKAY.

20 MR. RUBIN: AND I APOLOGIZE. I WAS
21 REALLY TRYING TO MAKE MORE THEORETICAL POINTS THAN
22 SPECIFIC ONES ABOUT THINGS THAT ARE OUTSIDE THE
23 REALM.

24 BUT WE DON'T HAVE ANY INTENTION OF DOING
25 ANYTHING -- IN FACT, WE THINK THE PRO COMPETITIVE

1 NATURE OF THESE DOCUMENTS IS SOMETHING THAT, IF THE
2 CASE WERE TO PROCEED, SHOULD BE FRONT AND CENTER IN
3 THE CASE.

4 THE COURT: ALL RIGHT. WHAT ABOUT
5 DECEMBER 16TH FOR YOUR PRIVILEGE LOG? I COULD GIVE
6 YOU DECEMBER 19TH. IT JUST GOES INTO THAT, YOU
7 KNOW, THE WEEK OF CHRISTMAS, NEW YEARS, HANUKKAH.

8 MR. RUBIN: THAT'S FINE. DECEMBER 16TH
9 IS FINE.

10 THE COURT: OKAY. SO PRIVILEGE LOG IS
11 GOING TO BE DECEMBER 16TH OF 2011.

12 OKAY. ANYTHING ELSE ON THIS --

13 MR. RUBIN: YOUR HONOR, WE WILL --

14 THE COURT: -- ISSUE?

15 MR. RUBIN: WE HAVE BEEN, AS A GROUP --
16 IT DOES TAKE US A LITTLE MORE TIME TO GET BACK TO
17 PLAINTIFFS AND FOR PLAINTIFFS TO GET BACK TO US
18 BECAUSE IT'S A LARGER GROUP.

19 THE COURT: COORDINATION, SURE.

20 MR. RUBIN: BUT WE ARE WORKING ON THE
21 PROTECTIVE ORDER AND I EXPECT WE'LL HAVE SOMETHING
22 BACK TO PLAINTIFFS SOON SO THAT WE GIVE THE COURT
23 AN OPPORTUNITY TO ENTER THAT WELL BEFORE THE
24 DOCUMENT PRODUCTION IS DUE.

25 THE COURT: ALL RIGHT. WELL, IF THERE'S

1 NO AGREEMENT BY NOVEMBER 30TH, YOU'RE JUST GOING TO
2 USE THE NORTHERN DISTRICT'S AGREEMENT UNTIL YOU GET
3 ONE IN PLACE.

4 NOT HAVING A PROTECTIVE ORDER CANNOT BE A
5 BASIS FOR WITHHOLDING A PRODUCTION.

6 MR. RUBIN: WE'LL BE GETTING IT BACK TO
7 THEM SOON.

8 THE COURT: ALL RIGHT. I'M NOT GOING TO
9 PUSH ANY DATES ON THAT. I'M GOING TO ASSUME THAT
10 YOU ALL WILL WORK THAT OUT AMONGST YOURSELVES.

11 OKAY. ALL RIGHT. I'D LIKE TO WORK OUT A
12 CASE SCHEDULE, UNDERSTANDING I DON'T KNOW AT THIS
13 POINT IF THE PLAINTIFFS WILL BE ABLE TO SURVIVE A
14 MOTION TO DISMISS, BUT I ANTICIPATE THAT EVEN IF
15 THEY DON'T THIS FIRST ROUND, I'D PROBABLY GIVE THEM
16 LEAVE TO AMEND SO WE'D PROBABLY CONTINUE IN THIS
17 CASE.

18 SO I'D LIKE TO SUGGEST THE FOLLOWING
19 SCHEDULE, AND I'LL GIVE YOU ALL TIME TO SPEAK UP ON
20 IT.

21 SO I WOULD ACTUALLY BE SETTING A TRIAL
22 OUT FOR JUNE 10TH OF 2013, WHICH IS A LOT FURTHER
23 OUT THAN I'D LIKE TO GO, BUT IT'S CONSIDERABLY
24 SHORTER THAN WHAT BOTH PARTIES HAVE ASKED.

25 BUT THAT WOULD STILL BE MORE THAN TWO

1 YEARS FROM WHEN THE FIRST PLAINTIFF FILED HIS
2 COMPLAINT.

3 AND JUST SORT OF WORKING BACK FROM THERE,
4 I WOULD SUGGEST A FURTHER CASE MANAGEMENT
5 CONFERENCE ON JANUARY 26TH, WHICH IS THE SAME DATE
6 AS THE HEARING ON THE MOTION TO DISMISS.

7 MR. SAVERI: I'M SORRY. NOW WE'RE
8 STARTING AT THE BEGINNING, SO IT WOULD BE --

9 THE COURT: YEAH, I JUST WANTED TO GIVE
10 YOU AN IDEA.

11 MR. SAVERI: I GOT IT. I THOUGHT WE WERE
12 TALKING ABOUT THE PRETRIAL CONFERENCE.

13 THE COURT: I CAN WORK BACKWARDS IF YOU
14 WANT.

15 MR. SAVERI: YOU SHOULD WORK, FROM MY
16 PERSPECTIVE, IN WHATEVER ORDER YOU'RE COMFORTABLE
17 IN.

18 THE COURT: DEADLINE TO AMEND THE
19 PLEADINGS, I'LL GO AHEAD AND SET THAT FOR MAY 15TH
20 OF 2012; MOTION FOR CLASS CERTIFICATION, JUNE 28TH
21 OF 2012; I WANT THE OPPOSITIONS AND REPLY TO BE
22 DONE PER THE LOCAL RULES; THE HEARING ON CLASS CERT
23 WOULD BE AUGUST 2ND OF 2012 AT 2:00 O'CLOCK; CLOSE
24 OF FACT DISCOVERY WOULD BE NOVEMBER 30TH OF 2012.

25 I DIDN'T UNDERSTAND THIS PRODUCTION OF

1 EXPERT MATERIALS. I THINK YOU SHOULD PRODUCE
2 WHATEVER YOUR EXPERT RELIED ON WITH HIS REPORT OR
3 HER REPORT.

4 MR. SAVERI: I'M SORRY. WITH THE REPORT?

5 THE COURT: YEAH.

6 MR. SAVERI: I CAN EXPLAIN THAT IF YOU'RE
7 INTERESTED.

8 THE COURT: YEAH, WHAT IS THAT?

9 MR. SAVERI: IN -- WE'RE REALLY TALKING
10 ABOUT EXPERT ECONOMISTS, AND SO THE WAY, JUST AS A
11 PRACTICAL MATTER, IT USUALLY WORKS IS THAT ON THE
12 DAY THAT IT'S DUE, THE ACTUAL PHYSICAL REPORT IS
13 PRODUCED.

14 BUT BECAUSE THE ECONOMISTS HAVE MATERIALS
15 THEY RELY ON, INCLUDING THEIR CALCULATIONS,
16 SOMETIMES WITH THE PRESS OF TIME, IT'S JUST TOO
17 MUCH TO DO THAT DAY.

18 SO I'VE FREQUENTLY ENTERED INTO AN
19 AGREEMENT WITH THE OTHER SIDE TO GIVE US A COUPLE
20 DAYS TO KIND OF GET THE WORK PAPERS OUT, BECAUSE IT
21 JUST MAKES LIFE A LITTLE BIT MORE CIVILIZED AND
22 EASY FOR EVERYBODY BECAUSE THEY HAVE THE REPORT,
23 AND THEN A COUPLE DAYS THEREAFTER, THEY KIND OF GET
24 THE BACK-UP.

25 THAT'S THE IDEA. I DON'T KNOW IF IT'S A

1 GREAT IDEA.

2 THE COURT: I'M NOT GOING TO ORDER THAT.
3 IF YOU WORK THAT OUT WITH THE DEFENDANTS, THAT'S UP
4 TO YOU.

5 MR. SAVERI: FINE.

6 THE COURT: OKAY. SO EXCHANGE OF
7 REBUTTAL REPORTS JANUARY 4TH OF 2013.

8 MR. SAVERI: CAN WE -- THERE WAS A SLIGHT
9 DIFFERENCE BETWEEN THE PLAINTIFFS' AND DEFENDANTS'
10 APPROACH ON THAT, AND AT LEAST I WANT TO MAKE THAT
11 CLEAR.

12 THE COURT: UM-HUM.

13 MR. SAVERI: THE WAY WE HAD INTENDED IT,
14 WHAT WE BELIEVE IS CONSISTENT WITH RULE 26 AND
15 ORDINARY PRACTICE, IS THAT THERE WOULD BE A
16 SIMULTANEOUS PRODUCTION INVOLVING EXPERT REPORTS ON
17 A SINGLE DAY, AND THEN THE -- ALL SIDES WOULD HAVE
18 AN OPPORTUNITY TO LOOK AT THAT AND TAKE DISCOVERY
19 AND THEN, IF THEY NEED TO, DO A REAL REBUTTAL
20 REPORT.

21 AS I UNDERSTAND THE DEFENDANTS' PROPOSAL,
22 THEY WOULD LIMIT THE INITIAL PRODUCTION TO ONLY
23 EXPERTS IN SUPPORT OF PARTIES OR ON ISSUES WHERE
24 THE PARTY HAS THE BURDEN OF PROOF, AND THEN THERE
25 WOULD ONLY BE A REBUTTAL REPORT TO THOSE -- TO

1 THOSE.

2 SO, FOR EXAMPLE, IF --

3 THE COURT: THAT MAKES SENSE TO ME.

4 MR. SAVERI: WELL, WHAT THAT WOULD MEAN,
5 THOUGH, IS THAT IF I DID NOT BEAR THE BURDEN OF
6 PROOF --

7 THE COURT: UM-HUM.

8 MR. SAVERI: NO. IF I DID BEAR THE
9 BURDEN OF PROOF, THE DEFENDANT -- AND THE
10 DEFENDANTS --

11 THE COURT: JUST DO A REBUTTAL REPORT.

12 MR. SAVERI: SO I WOULDN'T -- AND I
13 WOULDN'T HAVE AN OPPORTUNITY TO RESPOND TO THAT.

14 OR -- SO I THINK IT MAKES MORE SENSE IF,
15 FOR EXAMPLE, WE'RE GOING TO HAVE AN EXPERT REPORT
16 ON DAMAGES, OKAY, EACH SIDE IS GOING TO PRODUCE AN
17 EXPERT REPORT ON DAMAGES; PRESUMABLY WE'RE GOING TO
18 SAY THAT THE DAMAGES WERE HIGH AND THERE WERE A
19 LOT; DEFENDANTS ARE GOING TO SAY SOMETHING LIKE,
20 "WHAT DAMAGES? THERE WEREN'T ANY."

21 AND SO I THINK IT MAKES SENSE FOR THE
22 COURT TO HAVE, AND THE PARTIES, TO HAVE THE BENEFIT
23 OF A RESPONSE TO THAT, AND IT'S NOT CLEAR TO ME,
24 UNDER THE DEFENDANT'S PROPOSAL, WHO GETS TO FILE
25 WHICH REPORT WHEN.

1 SO, I MEAN, THAT -- THAT'S WHY WE'VE
2 PROPOSED OUR SYSTEM, WHICH I THINK IS, FRANKLY,
3 TAKEN FROM THE CALIFORNIA, YOU KNOW, STATE
4 PROCEDURE AND I FOUND THAT THAT WORKS PRETTY WELL.

5 SO --

6 THE COURT: I DON'T LIKE THAT.

7 MR. SAVERI: OKAY.

8 THE COURT: OKAY? ALL RIGHT.

9 I MEAN, I ASSUME DAMAGES IS YOUR BURDEN.
10 YOU DO THE OPENING REPORT, THEY DO THE REBUTTAL,
11 YOU'LL GET TO DO DEPOSITIONS OF EACH OTHER'S
12 EXPERTS.

13 I DON'T WANT TO SEE A WHOLE BUNCH OF
14 REPLY REBUTTAL REPORTS.

15 MR. SAVERI: OKAY.

16 THE COURT: YEAH, OKAY.

17 SO THE INITIAL EXPERT REPORT, AS YOU
18 SAID, WHOEVER HAS GOT THE BURDEN IS GOING TO DO THE
19 OPENING EXPERT REPORT, DECEMBER 14TH; THE REBUTTAL
20 EXPERT REPORT, JANUARY 4TH -- NOW, THAT'S KIND OF
21 PAINFUL; CLOSE OF EXPERT DISCOVERY, JANUARY 25TH.

22 NOW, OTHER THAN DAMAGES, WHAT OTHER
23 EXPERTS DO YOU --

24 MR. SAVERI: I'M SORRY. YOU GOT AHEAD OF
25 ME. JANUARY 26? I'M SORRY, YOUR HONOR.

1 THE COURT: OF 2013.

2 MR. SAVERI: AND I'M SORRY. WHAT WAS
3 YOUR QUESTION?

4 THE COURT: WHAT EXPERTS DO YOU ENVISION?

5 MR. SAVERI: I THINK, FROM THE
6 PLAINTIFFS' PERSPECTIVE, THAT WE WOULD -- IT IS
7 LIKELY THAT WE WILL HAVE AN EXPERT ON DAMAGES.

8 THE COURT: UM-HUM.

9 MR. SAVERI: WE MAY HAVE AN INDUSTRY
10 EXPERT THAT TALKS ABOUT THESE PARTICULAR MARKETS OR
11 LABOR MARKETS.

12 I MEAN, THERE ARE CERTAIN TYPES OF EXPERT
13 TESTIMONY THAT DOESN'T RELATE TO THE ACTUAL DAMAGES
14 THAT WE MIGHT WANT TO OFFER AT TRIAL, THAT TALK
15 ABOUT HOW THESE MARKETS WORK.

16 SO IT WOULD BE ABOUT THE INDUSTRY AND THE
17 SHAPE OF THE MARKET.

18 SO THAT'S GENERALLY WHAT -- IF YOU'RE
19 ASKING ME TO KIND OF LIMIT OR IDENTIFY SOMETHING,
20 THAT IS WHAT I WOULD IDENTIFY NOW BEFORE ANY
21 DISCOVERY HAS BEEN TAKEN.

22 SO I GUESS WHAT I WOULD SAY IS WE WOULD
23 CONTEMPLATE AT LEAST A DAMAGE EXPERT, AND MAYBE ONE
24 OR TWO MORE, BUT WE HAVEN'T FIGURED THAT OUT YET,
25 YOUR HONOR.

1 THE COURT: OKAY. WHAT ABOUT FROM THE
2 DEFENSE? OBVIOUSLY YOU'D DO A REBUTTAL.

3 MR. RUBIN: RIGHT. AND I THINK THAT
4 THERE'S AT LEAST SOME CONTEMPLATION, IF THE CASE
5 WERE TO PROCEED, OF A LABOR ECONOMIST.

6 THE COURT: OKAY.

7 MR. RUBIN: SOMEBODY WHO COULD SPEAK TO
8 LABOR MARKETS GENERALLY, AND PERHAPS THE MARKET IN
9 PARTICULAR REGIONS OR AREAS IN PARTICULAR, JOB
10 MOBILITY, THOSE KINDS OF ISSUES.

11 THE COURT: OKAY. ALL RIGHT.

12 MR. SAVERI: WE WOULD HOPE, OF COURSE,
13 THAT THE DEFENDANTS WOULD TRY TO GET TOGETHER AND
14 NOT EACH FILE ONE REPORT ON ONE OF THOSE SUBJECTS.

15 MAYBE IT'S TOO MUCH TO ASK FOR, TO TALK
16 ABOUT RIGHT NOW, BUT --

17 MR. RUBIN: I THINK THAT IS A LITTLE
18 PREMATURE TO GET INTO NOW.

19 THE COURT: YEAH.

20 MR. SAVERI: OKAY.

21 THE COURT: OKAY. LAST DAY TO FILE
22 DISPOSITIVE MOTIONS, FEBRUARY 7TH OF 2013.

23 OBVIOUSLY IF YOU WANT TO FILE -- IF
24 DEFENSE WANTS TO FILE ONE SOONER, YOU CAN DO IT AT
25 ANY TIME. OKAY?

1 MR. RUBIN: OKAY.

2 THE COURT: THAT'S THE LAST DATE.

3 MR. SAVERI: FEBRUARY 7TH?

4 THE COURT: OF 2013.

5 BRIEFING IS PER THE LOCAL RULES; THE
6 HEARING WOULD BE MARCH 14 OF 2013 AT 1:30; PRETRIAL
7 CONFERENCE WOULD BE MAY 15TH, 2013 AT 2:00 O'CLOCK.

8 AND I SET IT TWO MONTHS APART SO THAT I
9 CAN ISSUE YOU ORDERS ON THOSE MOTIONS.

10 AND THEN MY STANDING ORDER ON JURY TRIALS
11 REQUIRES THAT YOU MEET AND CONFER 21 DAYS BEFORE
12 THE PRETRIAL CONFERENCE AND DO ALL THE PRETRIAL
13 FILINGS BEFORE THE PRETRIAL CONFERENCE.

14 SO I WAS TRYING TO BUILD IN A LITTLE
15 TIME. MAYBE YOU MIGHT WANT TO RESOLVE THE CASE
16 AFTER YOU GET THE SUMMARY JUDGMENT RULING.

17 MR. SAVERI: WE HAD BUILT A LITTLE BIT
18 MORE IN JUST TO GIVE THE COURT MORE TIME TO DEAL
19 WITH THAT, BUT IF TWO MONTHS IS WHAT YOU'RE
20 COMFORTABLE WITH YOUR HONOR, THAT'S FINE.

21 THE COURT: THAT'S IT.

22 MR. SAVERI: I MEAN, JUST ON SUMMARY
23 JUDGMENT, WE MIGHT BE FILING OUR OWN DISPOSITIVE
24 MOTIONS, TOO.

25 THE COURT: THAT'S FINE. YOU'LL HAVE TO

1 CALL MS. PARKER-BROWN AND GET THE HEARING DATE.

2 MR. TUBACH: GOOD AFTERNOON, YOUR HONOR.
3 MICHAEL TUBACH ON BEHALF OF APPLE.

4 I HEARD THE COURT'S SCHEDULE. THOSE ARE
5 ALL THE DATES THAT THE COURT WAS GOING TO SET?

6 THE COURT: WELL, THE JURY TRIAL, 15
7 DAYS, WOULD BE JUNE 10TH, 2013 AT 9:00 A.M.

8 SO EVERYTHING IS, YOU KNOW, MORE THAN, I
9 GUESS, WHAT, A YEAR AND EIGHT, NINE MONTHS OUT.

10 MR. TUBACH: THERE'S ONLY ONE DATE IN
11 THERE, YOUR HONOR, THAT I WANTED TO ASK THE COURT
12 TO TRY TO CHANGE.

13 THE COURT: OKAY.

14 MR. TUBACH: AND THAT IS THAT WE -- TO DO
15 THE BRIEFING UNDER THE LOCAL RULES ON A CLASS CERT
16 MOTION IS VERY DIFFICULT.

17 WE HAVE TO WORK -- IT IS AN INTENSELY
18 ANALYTICAL PROCESS. WE HAVE TO WORK WITH EXPERTS,
19 WE HAVE TO SEE WHAT IT IS THAT THE PLAINTIFFS FILE,
20 AND WE HAVE SEVEN DEFENDANTS HERE WHO ARE ALL GOING
21 TO BE KEENLY INTERESTED IN THAT MOTION.

22 WE HAD ASKED -- THE PLAINTIFFS HAD
23 OFFERED GIVE US A MONTH TO RESPOND.

24 WE HAD -- WE, ROUTINELY IN ANTITRUST
25 CASES, GET 60 DAYS JUST BECAUSE IT'S SUCH INTENSIVE

1 EXPERT WORK THAT DOING SO ON THE LOCAL RULES UNDER
2 NORMAL BRIEFING IS GOING TO BE REALLY DIFFICULT FOR
3 US.

4 THE COURT: ALL RIGHT. WELL, I KIND OF
5 WOULD LIKE TO KEEP THIS TRIAL DATE, SO TELL ME IF I
6 CAN SHAVE OFF -- HOW MUCH FACT DISCOVERY DO YOU
7 THINK YOU'LL NEED AFTER THE CLASS CERT ORDER?

8 MR. TUBACH: WELL, THOSE BOTH CAN BE
9 GOING ON -- THERE WON'T BE A STAY ON DISCOVERY,
10 OBVIOUSLY, WHILE CLASS CERT IS BEING BRIEFED.

11 THE COURT: RIGHT.

12 MR. TUBACH: PERHAPS THE PLAINTIFFS COULD
13 FILE THEIR CLASS CERT MOTION EARLIER TO GIVE US
14 THOSE 60 DAYS.

15 MR. SAVERI: YOUR HONOR, I THINK THAT IF
16 THE DEFENDANTS BELIEVE THAT THEY NEED MORE TIME --
17 AND I WOULD CONCEDE AND AGREE WITH MR. TUBACH THAT
18 IN CASES FREQUENTLY THERE'S MORE TIME GIVEN -- BUT
19 THAT WE DO THAT IN A WAY THAT DOESN'T MOVE UP OUR
20 DATE.

21 BUT ASSUMING THAT CLASS CERTIFICATION IS
22 PROCEEDING WHILE WE'RE DOING OTHER WORK IN THE
23 CASE, THE WAY TO SOLVE THAT PROBLEM WOULD BE TO
24 LEAVE THE JUNE 28TH DATE AND THEN MOVE OUT THE
25 BRIEFING AND THE HEARING.

1 THE COURT: ALL RIGHT.

2 MR. TUBACH: OR A COMBINATION OF THOSE
3 TWO.

4 THE COURT: I'M NOT GOING TO MOVE THE
5 FACT DISCOVERY CUT OFF. THAT WILL REMAIN
6 NOVEMBER 30TH.

7 IS THAT OKAY?

8 MR. TUBACH: THAT WOULD BE FINE.

9 MR. SAVERI: THAT'S FINE.

10 THE COURT: ALL RIGHT. SO JUNE 28TH.

11 WHAT IF I JUST -- WHAT IF YOU HAD UNTIL
12 JULY 29TH? A FULL MONTH?

13 MR. TUBACH: IF I CAN GET MORE, I'LL TAKE
14 IT. IF THAT'S ALL I CAN GET, I'LL TAKE THAT, TOO.

15 THE COURT: LET'S SEE. WELL, HOW MUCH
16 TIME -- THIS IS THE -- MY CONCERN IS THIS IS
17 PROBABLY GOING TO BE A PRETTY COMPLEX CLASS CERT
18 MOTION. I MAY NEED AT LEAST A MONTH TO ISSUE YOU
19 AN ORDER, AND I THOUGHT THAT YOU MAY WANT SOME MORE
20 FACT DISCOVERY BEFORE -- I MEAN AFTER YOU GET THE
21 CLASS CERT ORDER.

22 SO HOW MUCH TIME DO YOU NEED? BECAUSE I
23 WANT TO KEEP THIS NOVEMBER 30TH FACT DISCOVERY CUT
24 OFF.

25 MR. TUBACH: I AM WONDERING IF YOU COULD

1 MOVE UP, JUST A LITTLE BIT TO MR. SAVERI'S
2 DISADVANTAGE, MAYBE MOVE UP THE FILING DEADLINE
3 JUST TWO OR THREE WEEKS AND THAT WOULD GIVE US A
4 LITTLE ADDITIONAL BREATHING ROOM.

5 I THINK THAT MIGHT BE ACCEPTABLE TO
6 MR. SAVERI.

7 MR. SAVERI: I PREFER TO PUSH OUT THE
8 OTHER END AND TRY TO KEEP THE, THAT DATE SO THAT
9 WE'VE HAD ENOUGH -- I MEAN, WE'RE TALKING ABOUT A
10 DATE THAT'S, YOU KNOW, ABOUT SEVEN MONTHS FROM NOW
11 AND WE HAVEN'T HAD ANY DISCOVERY RIGHT NOW.

12 SO I WANT TO -- YOU KNOW, PARTICULARLY
13 IF --

14 THE COURT: MY ONLY OTHER CONCERN -- I'M
15 SORRY TO INTERRUPT YOU --

16 MR. SAVERI: I'M SORRY, YOUR HONOR.

17 THE COURT: -- FOR NOT PUSHING THE CLASS
18 CERT DATE TOO MUCH IS LET'S SAY THEY GET LEAVE TO
19 AMEND AND YOU FILE A SECOND MOTION TO DISMISS.

20 MR. TUBACH: RIGHT.

21 THE COURT: THEN WE MAY NOT HAVE THE
22 FINAL PLEADINGS UNTIL MAYBE, YOU KNOW, MID TO LATE
23 SPRING, AND SO THAT'S MY ONLY CONCERN ABOUT NOT
24 WANTING TO PUSH CLASS CERT UP TOO MUCH.

25 MR. TUBACH: IF WE COULD HAVE SEVEN

1 WEEKS, YOUR HONOR, OR SIX, WE CAN LIVE WITH THAT.

2 THE COURT: OKAY.

3 MR. TUBACH: I'LL TAKE WHAT I CAN GET.

4 MR. SAVERI: YOU KNOW -- WELL, OKAY. WE
5 SHOULD TALK ABOUT THE DATES AND THEN, YOU KNOW, I
6 WOULD -- I WOULD PRESUME MR. TUBACH WOULDN'T
7 QUARREL WITH US HAVING SOME MORE TIME TO DEAL WITH
8 HIS OPPOSITION.

9 MR. TUBACH: NO, WE WOULD NOT.

10 MR. SAVERI: AND EVEN IN OUR SCHEDULE, WE
11 HAD ASKED FOR ONLY A MONTH, WHICH I THINK IS ON THE
12 LIGHT SIDE, BUT WE'RE PREPARED TO STAND BY THE
13 MONTH AS A TIME TO DO THE REPLY.

14 AND I GUESS IF WE'RE NOT GOING TO DO
15 THAT, THEN I THINK WE SHOULD PROBABLY SHRINK THE
16 TIME TO DO THE OPPOSITION SO WE CAN KEEP THE
17 SCHEDULE.

18 THE COURT: OKAY. WHAT IF -- OKAY. SO
19 OPENING CLASS CERT MOTION IS GOING TO BE FILED
20 JUNE 28TH; THE CLASS CERT OP WOULD BE DUE
21 AUGUST 2ND; THE REPLY WOULD BE DUE AUGUST 30TH.

22 AND THEN LET ME ASK IF MS. PARKER-BROWN
23 WOULD PLEASE FIND ME A NEW HEARING DATE MAYBE
24 MID-SEPTEMBER. I DON'T KNOW WHAT OUR --

25 THE CLERK: OF 2012?

1 THE COURT: OF 2012, PLEASE. EITHER
2 MAYBE THE 13TH OR 20TH. THE 20TH MAYBE.

3 THE CLERK: THE 13TH AND THE 20TH ARE
4 PRETTY WIDE OPEN.

5 MR. TUBACH: YOU MIGHT WANT TO PICK THE
6 20TH, YOUR HONOR, GIVEN THE AMOUNT OF BRIEFING
7 THAT'S GOING TO BE COMING.

8 THE COURT: I'M JUST WARNING YOU THAT I
9 MAY NOT ISSUE AN ORDER UNTIL MID-OCTOBER AND YOU
10 HAVE A NOVEMBER 30TH CUT OFF DATE.

11 MR. TUBACH: THAT'S OKAY FROM OUR POINT
12 OF VIEW.

13 THE COURT: THAT'S OKAY FOR EVERYBODY?

14 ALL RIGHT. WE'LL SET IT FOR
15 SEPTEMBER 20TH, THEN. THAT'LL BE --

16 MR. SAVERI: THE KEY FROM THE PLAINTIFFS'
17 PERSPECTIVE WOULD BE TO HAVE THAT ORDER OUT AND
18 GIVE CLASS MEMBERS SUFFICIENT TIME TO OPT OUT
19 BEFORE THE TRIAL DATE, AND THAT WOULD -- THAT'S --

20 MR. TUBACH: THAT'S MONTHS AND MONTHS
21 AWAY.

22 MR. SAVERI: SO I THINK WE'RE GOOD.

23 THE COURT: SO THEN IT'LL BE JUNE 28TH
24 AND AUGUST 2ND AND AUGUST 30TH AND SEPTEMBER 20TH
25 AT 1:30.

1 MR. SAVERI: 1:30?

2 THE COURT: YEAH, NOT 2:00 O'CLOCK.

3 MR. SAVERI: OKAY.

4 THE COURT: OKAY. ANY OTHER DATES THAT
5 YOU WANTED TO CHANGE?

6 MR. TUBACH: THAT WAS ALL I WANTED TO
7 ADDRESS.

8 THANK YOU, YOUR HONOR.

9 THE COURT: OKAY. ANY OTHERS?

10 MR. SAVERI: I -- JUST WILL YOU GIVE ME A
11 SECOND, YOUR HONOR, TO KIND OF GO THROUGH MY NOTES?

12 THE COURT: YEAH.

13 NOW, LET ME ASK ONE MORE QUESTION --
14 OKAY, GO AHEAD.

15 MR. SAVERI: I'M SORRY, YOUR HONOR.

16 WE HAD -- WE HAD BOTH PUT DATES IN OUR
17 SCHEDULE ABOUT THE SUBSTANTIAL COMPLETION OF THE
18 ROLLING PRODUCTION OF DOCUMENTS OTHER THAN THE
19 D.O.J., AND UNLESS I MISSED IT, YOU HAVEN'T SPOKEN
20 ABOUT THAT, AND THAT'S IMPORTANT AS A MILESTONE.

21 YOU KNOW, I THINK IT WOULD BE USEFUL TO
22 SET IT NOW, OR PERHAPS IF WE'RE COMING BACK HERE
23 SOON, WE COULD TALK ABOUT IT THEN.

24 THE COURT: I WOULD SET IT FOR JUNE 15TH
25 OF 2012.

1 MR. SAVERI: OKAY.

2 THE COURT: LET ME ASK, YOU KNOW, IN THE
3 D.C. CASE, THERE ALREADY ARE INJUNCTIONS, SO ISN'T
4 YOUR INJUNCTION REQUEST DUPLICATIVE? I GUESS I
5 DON'T SEE WHY YOU'RE MAKING AN INJUNCTION REQUEST.

6 IT'S MOSTLY MONEY THAT YOU WANT, RIGHT?

7 MR. SAVERI: OUR -- WE WOULD SAY, YES,
8 OUR CLAIM IS REALLY ABOUT DAMAGES.

9 THE COURT: YEAH.

10 MR. SAVERI: WE DON'T -- IF THE
11 DEPARTMENT OF JUSTICE INJUNCTION AFFECTS THIS AND
12 ENTERS INTO SOME KIND OF INJUNCTIVE RELIEF THAT
13 STOPS THE PRACTICE, THERE'S PROBABLY NOTHING FOR US
14 TO ARGUE ABOUT AND TO GET FROM YOU, AND I -- AND
15 SO --

16 THE COURT: IS THERE ANYTHING ABOUT THE
17 INJUNCTION IN THE D.C. CASE THAT IS NOT
18 SATISFACTORY TO YOU? IT SEEMS LIKE IT COVERS WHAT
19 YOU WANT IT TO COVER.

20 MR. SAVERI: RIGHT NOW I BELIEVE THE
21 ANSWER IS -- I BELIEVE THE ANSWER IS YES, I THINK
22 IT COULD SATISFY -- IS SATISFACTORY.

23 THE COURT: OKAY. I'M JUST WONDERING,
24 CAN WE GET A STIPULATION AND AT LEAST ELIMINATE
25 THAT SO I HAVE TO DO LESS WORK IN JANUARY AND

1 CHAMBERS -- WASN'T THAT ONE OF THE ISSUES, WAS THE
2 INJUNCTION DUPLICATIVE?

3 MR. RUBIN: YES.

4 MR. SAVERI: YOUR HONOR, WHAT I WOULD SAY
5 ABOUT THAT IS I WOULD LIKE TO LOOK AT THE
6 COMPLAINT, HAVE A CHANCE TO LOOK AT MY NOTES AND
7 LOOK AT THE INJUNCTION, AND I'M PREPARED TO TALK
8 WITH THE DEFENDANTS IN THE NEXT WEEK OR SO AND SEE
9 IF WE CAN DO A LITTLE CLEARING OUT OF THE
10 UNDERBRUSH ON THIS.

11 THE COURT: OKAY. I WANT TO SET A
12 DEADLINE THEN, FOR ME, TOO, BECAUSE I'LL TELL YOU
13 RIGHT NOW, IT LOOKS DUPLICATIVE TO ME AND IF I WERE
14 TO RULE NOW, I WOULD SAY STRIKE IT.

15 AND I HOPE -- I WANT THE SAME
16 REASONABLENESS THAT I'VE DEMANDED ON THE
17 DEFENDANTS' SIDE FOR THE PLAINTIFF. I DON'T WANT
18 YOU TO BE MAKING A LOT OF COURT RESOURCES BE SPENT
19 ON REALLY FRIVOLOUS THINGS THAT THE PARTIES SHOULD
20 BE REASONABLE AND NOT FIGHTING ABOUT.

21 MR. SAVERI: ABSOLUTELY, YOUR HONOR.

22 THE COURT: OKAY. SO WHEN ARE YOU GOING
23 TO GIVE ME THAT STIPULATION STRIKING THOSE
24 INJUNCTIONS?

25 MR. SAVERI: WELL, I THINK WHAT I'D SAY

1 IS WE CAN TALK ON -- IT'S WEDNESDAY NOW. WE CAN
2 TALK --

3 THE COURT: YEAH.

4 MR. SAVERI: -- EARLY NEXT WEEK AND WE
5 CAN LET YOU KNOW BY THE END OF NEXT WEEK.

6 THE COURT: OKAY. SO --

7 MR. SAVERI: SO THAT SOUNDS LIKE TEN
8 DAYS, OR --

9 THE COURT: OKAY. END OF NEXT WEEK WOULD
10 BE NOVEMBER 4TH.

11 MR. TUBACH: THAT'S FINE.

12 THE COURT: OKAY. SO BY NOVEMBER 4TH OF
13 2011, I WANT YOU TO FILE EITHER A STIPULATION
14 DISMISSING THE REQUEST FOR -- THE PRAYER FOR
15 INJUNCTIVE RELIEF; AND IF YOU'RE NOT GOING TO DO
16 THAT, YOU BETTER EXPLAIN WHY YOU NEED ONE AND WHY
17 THE INJUNCTIONS ENTERED IN THE DISTRICT OF COLUMBIA
18 ARE NOT SUFFICIENT.

19 MR. SAVERI: OKAY.

20 THE COURT: OKAY?

21 MR. SAVERI: IF WE WERE TO DO THAT, DO
22 YOU WANT US TO DO IT INFORMALLY BY A LETTER OR --

23 THE COURT: NO. JUST FILE A STIPULATION
24 AND E-FILE IT.

25 MR. SAVERI: OKAY.

1 THE COURT: BUT, PLEASE, I REALLY DO
2 NOT --

3 MR. SAVERI: I HEAR YOU.

4 THE COURT: -- WANT A LOT OF UNNECESSARY
5 LITIGATION ON THINGS THAT PEOPLE ARE TAKING
6 UNREASONABLE POSITIONS ON, AND I THINK IT'S
7 UNREASONABLE FOR YOU TO ASK FOR A DUPLICATIVE
8 INJUNCTION.

9 MR. SAVERI: I HEAR YOU, YOUR HONOR.

10 THE COURT: OKAY. SO -- ALL RIGHT. LET
11 ME SEE WHAT ELSE.

12 ALL RIGHT. SO LET ME JUST DO MY OWN
13 HOUSEKEEPING HERE.

14 I'M VACATING -- I'M VACATING THE
15 DECEMBER 8TH HEARING, THE HEARING ON THE MOTION FOR
16 TEMPORARY STAY. OKAY? IT IS GRANTED IN PART AND
17 DENIED IN PART PER WHAT I'VE ALREADY STATED. OKAY?

18 AND I'LL ISSUE A CASE MANAGEMENT ORDER
19 THAT SORT OF LAYS THIS OUT.

20 ALL RIGHT. SO THAT'S OFF.

21 ALL RIGHT. NOW, YOU HAVE A FOIA REQUEST
22 THAT'S NOW BEFORE JUDGE LLOYD, AND I THINK THAT'S
23 NOW BEEN MOOTED SINCE I'M BASICALLY ORDERING THE
24 PRODUCTION OF THOSE D.O.J. DOCUMENTS. ALL RIGHT?

25 MR. SAVERI: I THINK THAT'S RIGHT, YOUR

1 HONOR.

2 THE COURT: SO I WANT YOU TO WITHDRAW
3 THAT MOTION, OR I GUESS DISMISS THAT CASE.

4 IS THAT RIGHT?

5 MR. SAVERI: YEAH, WE'VE DISMISSED --
6 IT'S A COMPLAINT, SO WE WOULD DO SOME KIND OF
7 VOLUNTARY DISMISSAL OF THE CASE.

8 THE COURT: OKAY. AND GIVE ME A DATE
9 WHEN YOU'RE GOING TO DO THAT.

10 MR. SAVERI: I DON'T KNOW HOW LONG IT'S
11 GOING TO -- HOW ABOUT -- CAN I HAVE JUST A WEEK,
12 MAYBE THE MIDDLE OF NEXT WEEK?

13 THE COURT: OKAY. NOVEMBER 4TH THEN.
14 OKAY.

15 ALL RIGHT. NOW, WHAT ABOUT INITIAL
16 DISCLOSURES?

17 I KNOW THE OTHER THING YOU WANTED WAS
18 PERCIPIENT WITNESSES.

19 I THINK INITIAL DISCLOSURES ARE FAIR GAME
20 AND I'M NOT GOING TO STAY THAT.

21 MR. TUBACH: YOUR HONOR, WE'VE ALREADY
22 DONE THEM.

23 MR. RUBIN: WE'VE DONE THEM.

24 THE COURT: OH, YOU HAVE?

25 MR. SAVERI: WE GOT THEM, SO THAT SOLVED

1 THAT.

2 THE COURT: ALL RIGHT. SO THAT'S
3 RESOLVED.

4 NOW, LET ME ASK, DO YOU ANTICIPATE THERE
5 BEING OTHER SORT OF COPYCAT COMPLAINTS FILED? LIKE
6 IS THIS GOING TO BE AN MDL AND WHAT --

7 MR. TUBACH: ONE CAN NEVER GUESS, YOUR
8 HONOR.

9 SO FAR THE ONLY COMPLAINTS THAT HAVE BEEN
10 FILED HAVE BEEN FILED BY MR. SAVERI. THERE ARE
11 FIVE DIFFERENT COMPLAINTS FILED BY HIM, AT LEAST SO
12 FAR. WE HAVEN'T SEEN ANY OTHERS.

13 THE COURT: ALL RIGHT.

14 MR. TUBACH: THERE'S NO GUARANTEE.

15 IF THAT DOES HAPPEN, WE WOULD -- IT WOULD
16 BE EASIER TO TRY TO CONVINCE THEM TO COME TO THE
17 NORTHERN DISTRICT VOLUNTARILY, BUT IF NOT, WE MIGHT
18 HAVE TO INVOKE THE MDL.

19 THE COURT: BUT THERE'S NONE IN
20 PUERTO RICO OR NOTHING --

21 MR. TUBACH: NO.

22 MR. SAVERI: NO GUAM, NO VIRGIN ISLANDS.
23 FROM MY PERSPECTIVE, THIS IS THE
24 UNIVERSE.

25 THE COURT: OKAY.

1 MR. SAVERI: I MEAN, EVERYBODY WHO'S
2 INTERESTED IS HERE NOW.

3 THE COURT: OKAY. ALL RIGHT.

4 NOW, THE OTHER QUESTION IS -- AND I WANT
5 YOU ALL TO EDUCATE ME, AND I'M SORRY FOR BEING
6 BLUNT, BUT, I MEAN, I ASSUME THESE CASES NORMALLY
7 SETTLE AND DON'T GO TO TRIAL.

8 AT WHAT POINT DO THEY TEND TO DO THAT?
9 IS IT AFTER -- WOULD YOU BE OPEN TO EXPLORING ADR
10 IF THEY CAN SURVIVE A MOTION TO DISMISS?

11 DO YOU WANT TO WAIT UNTIL CLASS CERT
12 BRIEFING?

13 AT WHAT POINT DOES IT MAKE SENSE TO HAVE
14 AN ATTEMPT AT A RESOLUTION?

15 MR. TUBACH: YOUR HONOR, I'VE DONE A --

16 MR. SAVERI: YOUR HONOR, LET ME --

17 THE COURT: YEAH.

18 MR. SAVERI: FROM THE PLAINTIFFS
19 PERSPECTIVE, I WOULD SAY A COUPLE THINGS.

20 WE ARE ALWAYS WILLING TO TALK TO THE
21 DEFENDANTS AS A GROUP OR INDIVIDUALLY ABOUT
22 RESOLUTION.

23 WE FREQUENTLY HAVE CASES THAT RESOLVE AT
24 THIS JUNCTURE.

25 WE HAVE SOME THAT LINGER AND GO THROUGH

1 SUMMARY JUDGMENT.

2 THE COURT: YEAH.

3 MR. SAVERI: I DO NOT THINK IT IS
4 APPROPRIATE YET TO GO TO SOME KIND OF MANDATORY
5 MEETING, JUST WITH SOME MANDATORY ASSIGNMENT,
6 BECAUSE I JUST THINK IT'S TOO EARLY.

7 BUT IF THE DEFENDANTS WANTED TO DO THAT,
8 THAT WOULD BE ANOTHER THING.

9 BUT IT'S ALSO IMPORTANT NOT TO DERAIL
10 ANYTHING AND KEEP THIS THING MARCHING FORWARD IN
11 TERMS OF LITIGATION.

12 THAT WOULD BE MY ANSWER.

13 MR. TUBACH: YOUR HONOR, I GUESS WHAT I'D
14 ASK THE COURT TO DO IS TO DEFER TO OUR COLLECTIVE
15 EXPERIENCE ON THIS. WE'VE DONE A LOT OF THESE KIND
16 OF CASES.

17 THE COURT: YEAH. THAT'S WHY I'M ASKING
18 YOU.

19 MR. TUBACH: WE GENERALLY HAVE A SENSE OF
20 WHEN IS THE RIGHT TIME TO TALK.

21 THE COURT: YEAH, SURE.

22 MR. TUBACH: I THINK NOW IT'S THE
23 COLLECTIVE JUDGMENT THAT IT'S PREMATURE.

24 THE COURT: RIGHT. WHEN -- FROM YOUR
25 COLLECTIVE JUDGMENT, WHEN ARE THE KIND OF PRIMARY

1 KIND OF LEVERAGE POINTS? IS IT AFTER A MOTION TO
2 DISMISS? IT IS AFTER YOU SEE THEIR CLASS CERT
3 BRIEFING AND SEE HOW STRONG THEIR CASE IS?

4 MR. TUBACH: AND SUMMARY JUDGMENT. THOSE
5 ARE THE THREE.

6 AND IT MAY VERY WELL BE THAT AFTER A
7 MOTION TO DISMISS, IF ANYTHING SURVIVES, WHAT I
8 EXPECT IS THAT MR. SAVERI AND I AND OTHERS WILL
9 TALK AND SEE WHETHER IT MAKES SENSE AT THAT POINT,
10 AND WE'LL MAKE A DECISION THEN ABOUT WHETHER WE
11 THINK IT MAKES SENSE.

12 THE COURT: OKAY. WELL, I DO DEFER TO
13 YOUR EXPERIENCE. THAT'S WHY I'M ASKING WHEN THE
14 PRESSURE POINTS ARE.

15 OKAY. SO THEN WHAT I WILL --

16 MR. KEKER: YOUR HONOR, CAN I SAY
17 SOMETHING ABOUT THAT?

18 THE COURT: YES, PLEASE.

19 MR. KEKER: BECAUSE WE -- EVERYBODY IS
20 TRYING TO BE NICE AND EVERYBODY IS TRYING TO MAKE
21 THINGS EASY ON THE COURT BY SPEAKING WITH ONE VOICE
22 FROM THE DEFENSE SIDE.

23 THERE ARE SEVEN SEPARATE DEFENDANTS HERE.

24 THE EXPECTATION THAT ALL THE DEFENDANTS
25 ARE GOING TO HAVE THE SAME ATTITUDE ABOUT

1 SETTLEMENT, WHEN TO SETTLE, WHETHER TO SETTLE, IS
2 AT LEAST PREMATURE AND RIGHT NOW YOU MIGHT GET
3 DIFFERENT REACTIONS FROM DIFFERENT PEOPLE.

4 SO I HAVEN'T SAID A WORD BECAUSE WE'RE
5 HAVING ANOTHER CASE MANAGEMENT CONFERENCE.

6 THERE MAY BE MOTIONS TO SEVER. THERE
7 MAY -- IF WE GET INTO THIS BILATERAL BUSINESS,
8 THERE MAY BE A VERY DIFFERENT SITUATION FOR ONE
9 DEFENDANT THAN SOME OTHER SET OF DEFENDANTS.

10 THE COURT: UM-HUM.

11 MR. KEKER: SO I JUST HOPE THAT WE DON'T
12 GET THIS MENTALITY THAT THIS IS ALL GOING TO GO
13 SMOOTHLY WITH ALL THE SEVEN DEFENDANTS MARCHING IN
14 LOCKSTEP LIKE PENGUINS OR CONSPIRATORS, BECAUSE WE
15 SAY WE'RE NOT CONSPIRATORS.

16 THE COURT: RIGHT.

17 MR. KEKER: AND SO ANYWAY, THAT'S ALL.

18 THE COURT: I HAVE THAT --

19 MR. KEKER: I DON'T HAVE ANYTHING
20 CONSTRUCTIVE TO ADD EXCEPT LET'S KEEP THAT IN MIND.

21 THE COURT: RIGHT. I DON'T HAVE ANY
22 EXPECTATION.

23 I WOULD ASSUME THAT PLAINTIFFS WOULD WANT
24 TO PICK OFF ANY LOW HANGING FRUIT AND WORK ON
25 SETTLEMENTS PIECEMEAL, OR -- I DON'T KNOW.

1 MR. SAVERI: ABSOLUTELY. I MEAN, I --
2 I'M SORRY, YOUR HONOR.

3 THE COURT: LET ME ASK YOU, DO YOU AGREE
4 THAT THE PRESSURE POINTS, THOUGH, WOULD BE IF THE
5 PLAINTIFFS CAN SURVIVE A MOTION TO DISMISS; WHEN
6 YOU LOOK AT HOW STRONG THEIR CLASS CASE IS; AND
7 THEN MAYBE AFTER SUMMARY JUDGMENT RULING OR AFTER
8 YOU SEE THEIR BRIEFING ON SUMMARY JUDGMENT?

9 MR. KEKER: BASED ON MY EXPERIENCE, IT
10 OFTEN DOESN'T REALLY SORT OF CRYSTALIZE UNTIL YOU
11 SEE THE DAMAGES ANALYSIS, AND SOMETIMES UNTIL YOU
12 GET A DAUBERT RULING, BECAUSE SOME OF THE DAMAGE
13 CALCULATIONS --

14 THE COURT: OKAY.

15 MR. KEKER: -- IN THESE CASES THAT COME
16 UP ARE MAGICAL THINKING AND ARE EITHER AN
17 IMPEDIMENT TO SETTLEMENT OR MAKE SETTLEMENT
18 IMPOSSIBLE.

19 SO THAT'S ANOTHER -- I MEAN, I'VE SEEN
20 THEM GO RIGHT UP UNTIL THE END.

21 THE COURT: OKAY. YOU KNOW WHAT? THANK
22 YOU FOR RAISING THAT.

23 MR. KEKER: SURE.

24 THE COURT: I WANT TO MAKE IT CLEAR THAT
25 THE DAUBERT MOTIONS NEED TO GO AND BE FILED AND

1 BRIEFED WITH THE DISPOSITIVE MOTIONS RATHER THAN AS
2 MOTIONS IN LIMINE. OKAY?

3 MR. SAVERI: THAT'S JUST -- OKAY.
4 DAUBERT ON THE EXPERTS THEN?

5 THE COURT: YES, DAUBERT ON THE EXPERTS,
6 THOSE MOTIONS WILL BE SORT OF BRIEFED AND HEARD
7 WITH THE DISPOSITIVE MOTIONS.

8 MR. SAVERI: AND ON THE SAME SCHEDULE, I
9 ASSUME.

10 THE COURT: ON THE SAME SCHEDULE, YEAH.

11 AND THAT WAY I CAN HOPEFULLY GIVE SOME
12 CLARITY ON THAT ISSUE BEFORE THE PRETRIAL
13 CONFERENCE AND BEFORE YOU HAVE TO DO ALL THIS
14 PRETRIAL WORK.

15 MR. KEKER: GREAT. THANK YOU.

16 THE COURT: ANY OTHER DEFENDANTS HAVE A
17 DIFFERENT VIEW, ADDITIONAL THOUGHTS ON -- YOU HAVE
18 MORE EXPERIENCE WITH THESE CASES THAN I DO, SO
19 SHARE YOUR WISDOM AS TO WHAT ARE THE OTHER SORT OF
20 PRESSURE POINTS.

21 I BASICALLY WANT TO KNOW, WHAT DO YOU
22 NEED TO KNOW TO ASSESS YOUR CASE?

23 MR. RUBIN: I DO ECHO MR. KEKER'S
24 COMMENTS IN THE SENSE THAT I DO THINK THAT THERE
25 CAN BE SOME PRESUMPTUOUS SECURITIES CASES AND

1 ANTITRUST CASES THAT FOLLOW THIS INEXORABLE PATH OF
2 CERTAIN MOTION PRACTICE AND SOME DISCOVERY.

3 THE COURT: SURE.

4 MR. RUBIN: AND THEN THERE'S, YOU KNOW,
5 SORT OF INEVITABLY SOME SETTLEMENT DISCUSSION.

6 AND I DO THINK THAT MR. TUBACH IDENTIFIED
7 SORT OF THE POINTS, DAMAGE EXPERTS -- DAMAGES IS
8 ALWAYS VERY IMPORTANT, SUMMARY JUDGMENT FOR CERTAIN
9 DEFENDANTS.

10 BUT I WAS JUST INVOLVED IN A CASE IN
11 FRONT OF JUDGE WILKEN LAST YEAR WHERE THE
12 SETTLEMENT OCCURRED ON THE -- LITERALLY A WEEK
13 BEFORE TRIAL IN A LARGE ANTITRUST CONSPIRACY CASE
14 BECAUSE, YOU KNOW, ONE PARTICULAR DEFENDANT WAS
15 VERY DIFFERENTLY SITUATED, WHICH I THINK GOES TO
16 MR. KEKER'S POINT. DEFENDANTS ARE DIFFERENTLY
17 SITUATED DEPENDING ON HOW THE CASE PROCEEDS.

18 SO IT IS, I THINK, BECOMING INCREASINGLY
19 DIFFICULT TO SAY "THIS IS WHEN A CLASS ACTION
20 ANTITRUST CASE SETTLES."

21 AND I THINK IN THIS PARTICULAR CASE,
22 GIVEN THE MYRIAD OF ISSUES, I THINK IT'S DIFFICULT
23 TO SAY NOW WHEN THAT MOMENT, IF EVER, IS.

24 THE COURT: OKAY.

25 MR. SAVERI: I GUESS I WOULD SAY THAT

1 THERE -- THERE'S A RANGE OF EXPERIENCE. I MEAN,
2 CERTAINLY I'VE HAD LOTS OF CASES THAT SETTLED
3 BEFORE THE PLEADINGS WERE RESOLVED, TOO, AND I'VE
4 HAD CASES THAT SETTLED WHILE -- YOU KNOW, AFTER THE
5 JURY HAS BEEN IMPANELED, AND WE'VE IDENTIFIED SOME
6 OF THE MILESTONES.

7 THE COURT: YEAH. I JUST GET THE SENSE
8 THERE'S PROBABLY TOO MUCH AT STAKE FOR THIS ONE TO
9 BE RESOLVED BEFORE THE PLEADINGS ARE RESOLVED.

10 MR. SAVERI: ONE NEVER KNOWS.

11 THE COURT: YOU CAN CORRECT ME IF I'M
12 WRONG.

13 MR. RUBIN: WELL, IN THE CASE THAT I
14 MENTIONED, THERE WAS A LOT AT STAKE, IT WAS A \$1.5
15 BILLION CASE AND IT GOT TO THREE DAYS BEFORE TRIAL.

16 SO I JUST THINK IT DEPENDS ON THE
17 WEAKNESSES AND STRENGTHS OF THE CASE AND WHAT THE
18 COMPANY'S POSITION IS.

19 THERE ARE STILL -- AS THE MEDIATOR TOLD
20 US IN THAT CASE, THERE ARE CASES WHERE CORPORATIONS
21 STILL DEFEND ON PRINCIPLE AND THEY JUST THINK THEY
22 DIDN'T DO ANYTHING WRONG.

23 MR. SAVERI: AND SOME COMPANIES WANT TO
24 GET OUT AND RESOLVE THE CLAIMS AGAINST THEM EARLY
25 AND GET -- AND THE SETTLEMENT VALUE REFLECTS THAT.

1 SO THERE'S A RANGE OF EXPERIENCE AND
2 WE'LL SEE AS THIS THING UNFOLDS. I'M COMFORTABLE
3 WITH THAT.

4 THE COURT: OKAY. WELL, I'D LIKE YOU,
5 FOR THE JANUARY CMC, TO -- AT THAT POINT I'M SURE
6 WE'LL HAVE THIS DISCUSSION AGAIN -- IF AT THAT
7 POINT YOU THINK IT MAKES SENSE FOR ME TO SEND YOU
8 OUT FOR A 90 TO 120-DAY, SOME FORM OF ADR AFTER YOU
9 GET THE MOTION TO DISMISS RULING.

10 MR. SAVERI: OKAY.

11 THE COURT: OKAY. ALL RIGHT.

12 ANYTHING MORE? IS THERE ANYTHING ELSE
13 THAT WE DIDN'T TALK ABOUT TODAY THAT WE NEED TO
14 COVER?

15 I THINK WE COVERED EVERYTHING I WANTED
16 TO.

17 IS THERE ANYTHING ELSE THAT'S SORT OF
18 OUTSTANDING THAT YOU NEED?

19 MR. TUBACH: THE ONLY HOUSEKEEPING
20 MATTER -- I DON'T KNOW IF THE COURT SPECIFICALLY
21 DISPOSED OF THE JOINT DISCOVERY DISPUTE BEFORE
22 JUDGE LLOYD.

23 THE COURT: OH.

24 MR. TUBACH: I THINK THAT'S NOW MOOT IN
25 LIGHT OF WHAT WE'VE DISCUSSED HERE.

1 MR. SAVERI: I THINK SO. IT'S JUST -- TO
2 ME, I THOUGHT IT WAS JUST A MATTER OF HOUSEKEEPING
3 HOW WE PROCEED THERE, YOUR HONOR.

4 MR. TUBACH: I JUST WANTED TO MAKE SURE
5 THAT JUDGE LLOYD DIDN'T THINK HE STILL HAD
6 SOMETHING THAT HE HAD TO RESOLVE.

7 THE COURT: OH, NO.

8 MR. TUBACH: OKAY.

9 THE COURT: I TOLD HIM I WAS GOING TO
10 HANDLE THIS.

11 BUT WHAT I CAN DO IN THE CASE MANAGEMENT
12 ORDER IS TO ALSO SAY THAT DISCOVERY DISPUTE IS -- I
13 GUESS A REQUEST FOR DISCOVERY IS GRANTED IN PART
14 AND DENIED IN PART CONSISTENT WITH --

15 MR. RUBIN: IT'S THE SAME ISSUE.

16 THE COURT: DID WE GET RID OF ALL THE
17 OTHER HEARINGS OTHER THAN JANUARY 26TH THAT WAS
18 PENDING?

19 I KNOW JUDGE LLOYD HAD DECEMBER 8TH.

20 MR. SAVERI: EXCUSE ME, YOUR HONOR.

21 I BELIEVE THERE WERE THE THREE: LLOYD;
22 STAY; AND THE MOTION TO DISMISS.

23 AND WE TALKED ABOUT THEM ALL AND KIND OF
24 CLEANED THAT UP.

25 THE COURT: OKAY.

1 MR. SAVERI: I MEAN, THAT'S WHAT I --
2 WHAT MY NOTES INDICATE.

3 MR. RUBIN: I THINK THAT'S ALL -- THAT'S
4 ALL THE HEARINGS THAT ARE PENDING, YES.

5 THE COURT: OKAY. GREAT. I WILL SEE YOU
6 THEN ON JANUARY 26TH.

7 MR. RUBIN: THANK YOU.

8 THE COURT: OKAY. THANK YOU VERY MUCH.

9 MR. SAVERI: THANK YOU, YOUR HONOR.

10 MR. RUBIN: THANK YOU, YOUR HONOR.

11 MR. KEKER: THANK YOU, YOUR HONOR.

12 THE COURT: I APPRECIATE IT.

13 (WHEREUPON, THE PROCEEDINGS IN THIS
14 MATTER WERE CONCLUDED.)
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

/s/

LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595